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Supreme Court of the United States

ORIGINAL TERM, 1942

No. 392

**JOHN E. HEAD, & L. A. LEA COUNTY
FURNISHING CO., ET AL., APPELLANTS,**

**NEW MEXICO BOARD OF EXAMINERS
IN CYTOMETRY.**

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW MEXICO

**FILED APRIL 21, 1942
RECORDED INDEXED SEPTEMBER 11, 1942**

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 392

AGNES K. HEAD, d/b/a LEA COUNTY
PUBLISHING CO., ET AL., APPELLANTS,

vs.

NEW MEXICO BOARD OF EXAMINERS
IN OPTOMETRY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW MEXICO

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[fol. A]

**IN THE DISTRICT COURT OF LEA COUNTY
STATE OF NEW MEXICO**

No. 18794

NEW MEXICO BOARD OF EXAMINERS IN OPTOMETRY, Plaintiff,

—vs.—

ABNER ROBERTS; AGNES K. HEAD, d/b/a LEA COUNTY PUBLISHING Co.; PERMIAN BASIN RADIO CORPORATION; and KWEW, Inc., Defendants.

APPEARANCES

For the Plaintiff:

Robert F. Pyatt, Esquire, Hobbs, New Mexico.

For the Defendants:

L. George Schubert, Esquire, Hobbs, New Mexico, for Defendants Agnes K. Head and KWEW, Inc.

Theodore R. Johnson, Esquire, of Williams, Johnson & Houston, Hobbs, New Mexico, for Defendant Permian Basin Radio Corporation.

[fol. 1]

IN THE DISTRICT COURT OF LEA COUNTY

STATE OF NEW MEXICO

No. 18794

NEW MEXICO BOARD OF EXAMINERS IN OPTOMETRY, Plaintiff,

—vs.—

ABNER ROBERTS; AGNES K. HEAD, d/b/a LEA COUNTY PUBLISHING Co.; PERMIAN BASIN RADIO CORPORATION; and KWEW, Inc., Defendants.

COMPLAINT—Filed September 26, 1960

Plaintiff, for its claim against defendants, states:

[fol. 2]

1.

Plaintiff is an agency of the State of New Mexico, and brings this suit in its official capacity. Defendant Roberts is a resident of the State of Texas. Defendant Agnes K. Head is a resident of Lea County, New Mexico, and does business as Lea County Publishing Company, publishing the "Hobbs Flare", a newspaper, in Hobbs, New Mexico. Defendants Permian Basin Radio Corporation and KWEW, Inc. are corporations authorized to transact business in New Mexico, and each operates a radio transmitting station in Hobbs, Lea County, New Mexico. The acts complained of, or threatened in the future, have taken place or will take place in Lea County, New Mexico.

2.

By virtue of the terms of Sec. 67-7-4, N.M.S.A. 1953 Comp., as amended, it is the duty of plaintiff to administer those statutes of the State of New Mexico pertaining to the practice of optometry, compiled as Sections 67-7-1 to 67-7-14, N.M.S.A. 1953 Comp., both inclusive, as amended.

3.

Defendant Roberts has for some period of time conducted radio and newspaper advertising in Lea County, New Mexico. While Defendant Roberts presently resides in Texas, he has been duly licensed as an optometrist by plaintiff to practice in New Mexico. Defendant Roberts now practices optometry in Texas, just across the New Mexico-Texas boundary, a few miles each [sic] of Hobbs, Lea County, New Mexico. Defendant Roberts places such [fol. 3] advertising with the other defendants in this cause.

4.

Such advertising consists of the quotation of prices on eyeglasses and spectacles, and of the quotation of discounts to be offered on eyeglasses and spectacles, all of which has been done repeatedly, on numerous occasions, and directly in violation of Sec. 67-7-13, N.M.S.A. 1953 Comp., one of the statutes required to be administered by plaintiff.

5.

Defendant Roberts has threatened to continue such advertising, and plaintiff believes, and therefore alleges the fact to be, that the other defendants will accept such advertising in the future, and that the same will be continued by them.

6.

Defendant Roberts solicits patients in New Mexico by the additional method of sending circulars and other advertising directly to residents of this State, by means of the mail. Such circulars and other advertising quotes prices on eyeglasses and spectacles, and quotes discounts to be offered on eyeglasses and spectacles. Defendant Roberts threatens to continue these acts.

7.

Plaintiff has no plain, speedy, or adequate remedy at law, and therefore invokes the provisions of Sec. 67-26-24, N.M.S.A. 1953 Comp. 1959 Supp., being Sec. 24 of the Uniform Licensing Act.

Wherefore, plaintiff prays for this Court to award it an Injunction, enjoining and restraining defendant Roberts [fol. 4] from advertising in New Mexico, contrary to the provisions of Sec. 67-7-13, supra, and enjoining and restraining the other defendants in this cause from accepting and publishing such advertising in New Mexico; for its costs; and for other just relief.

Hilton A. Dickson, Jr., Attorney General; Robert F. Pyatt, Special Assistant Attorney General.

[fol. 5] SHERIFF'S RETURNS (omitted in printing).

4
[fol. 8]

IN THE DISTRICT COURT OF LEA COUNTY

SEPARATE ANSWER OF DEFENDANT AGNES K. HEAD,
d/b/a LEA PUBLISHING Co.—Filed October 25, 1961

Comes Now defendant Agnes K. Head and for answer to
plaintiff's Complaint states:

First Defense

Defendant moves the Court to dismiss this action because the Complaint fails to state a cause of action against this defendant upon which relief can be granted.

Second Defense

Defendant moves the Court to dismiss this action because the Court lacks jurisdiction [sic] of the subject matter of the action for the reason that it appears on the face of the Complaint that defendant, Roberts, practices optometry in the State of Texas and is outside the jurisdiction of this Court and the Statutes and laws made and provided are inapplicable to this defendant accepting advertising from a resident of another state lawfully engaging in a profession in said state.

Third Defense

Defendant further moves that said Complaint be dismissed because Sec. 67-7-13, N.M.S.A. 1953 Comp., has no reasonable relation to the maintenance of public health [fol. 9] of citizens of the State of New Mexico and unreasonably discriminates against this defendant and to enforce same would deny said defendant equal protection of the law and deprive her of property without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States and Sec. 18, Article II, of the Constitution of the State of New Mexico.

Fourth Defense

Defendant moves that said Complaint be dismissed on the grounds that the Complaint shows on its face that this defendant is engaged in interstate commerce and such

Statute imposes an undue burden on, and discriminates against such commerce and that it imposes an arbitrary and unreasonable imposition on this defendant's privilege of doing business and deprives her of her property without due process of law.

Wherefore, defendant moves that plaintiff's Complaint be dismissed.

L. George Schubert, P. O. Box 185, Hobbs, New Mexico, Attorney for Defendant, Agnes K. Head.

Certificate (omitted in printing):

[fol. 10]

IN THE DISTRICT COURT OF LEA COUNTY

SEPARATE ANSWER OF DEFENDANT KWEW, INC.—

Filed October 28, 1961

Comes Now the statutory agent, Walter E. Whitmore, Jr., for defendant KWEW, Inc. and in answer to plaintiff's complaint states:

1. Defendant moves the Court to dismiss this action on the grounds that the Complaint shows on its face that the defendant is engaged in interstate commerce and Section 67-7-13, N.M.S.A. 1953 Comp. creates an undue burden on, and imposes an arbitrary and unreasonable imposition on defendant's rights and privileges of engaging in interstate commerce. The grant of such an injunction would deprive the defendant of its property without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States and Section 18, Article II, of the Constitution of the State of New Mexico.

2. Defendant moves the Court to dismiss this action because the Complaint fails to state a cause of action against defendant in that Sec. 67-7-13 N.M.S.A. 1953 Comp. was not intended to impose liability upon the advertising media since the act as a whole seems to be directed toward preventing improper practices by those persons licensed by the State of New Mexico to practice optometry.

[fol. 11] 3. Defendant moves the Court to dismiss the Complaint because the Court lacks jurisdiction of the subject matter in that Defendant Roberts is outside the jurisdiction of this court and the Statutes and laws of New Mexico are inapplicable to defendant Roberts, who, as it appears on the face of the Complaint; is a Texas resident and is lawfully engaged in the practice of optometry in the State of Texas. That Section 67-7-13 is not applicable to defendant KWEW, Inc. to prevent defendant from accepting advertising from a resident of another state.

4. Defendant moves the Court to dismiss the Complaint because there is a legal and binding contract between defendant Roberts and defendant KWEW, Inc. made in the State of Texas, which would be grounds for an action against defendant KWEW, Inc. by defendant Roberts if defendant KWEW, Inc. should be enjoined from completing and performing its contract with defendant Roberts.

5. Defendant moves the Court to dismiss the Complaint because approximately one half of the service area of the defendant is in the State of Texas. An optometrist in the State of Texas is not prevented from advertising the price he will charge for glasses and thus should be allowed to place his advertising with whatever media will reach his prospective clients.

Walter E. Whitmore, Jr., Statutory Agent of
KWEW, Inc., P. O. Box 1019, Roswell, New
Mexico.

Copy mailed to Special Assistant Attorney General Robert F. Pyatt on October 28, 1960.

[fol. 12]

IN THE DISTRICT COURT OF LEA COUNTY —

MOTION TO STRIKE SEPARATE ANSWER OF DEFENDANT
KWEW, Inc. — Filed December 6, 1960

Plaintiff, for its motion to strike the separate answer of Defendant KWEW, Inc., states:

1.

Such separate answer was submitted and filed by one Walter E. Whitmore, Jr., as statutory agent of Defendant, KWEW, Inc.

2.

Walter E. Whitmore, Jr., is not, and at the time of such filing, was not a member of the Bar of the State of New Mexico.

Wherefore, Plaintiff respectfully prays that the separate answer of Defendant, KWEW, Inc., be stricken.

Respectfully submitted,

Hilton A. Dickson, Jr., Attorney General, Santa Fe,
New Mexico;

Robert F. Pyatt, Special Assistant Attorney Gen-
eral, P. O. Box 638, Hobbs, New Mexico;

Attorneys for Plaintiff.

Certificate of Service (omitted in printing).

[fol. 13]

IN THE DISTRICT COURT OF LEA COUNTY

SEPARATE ANSWER OF DEFENDANT PERMIAN BASIN
RADIO CORPORATION — Filed January 9, 1961

Comes Now defendant Permian Basin Radio Corporation and for its answer to the plaintiff's complaint filed herein states:

First Defense

Defendant moves the court to dismiss this action because the complaint fails to state a cause of action against this defendant upon which relief can be granted.

Second Defense

Defendant moves the court to dismiss this action because the court lacks jurisdiction of the subject matter of the action for the reason that it appears on the face of the complaint that defendant, Roberts, practices optometry in the State of Texas and is outside the jurisdiction of this court and the statutes and laws made and provided are inapplicable to this defendant accepting advertising from a resident of another state lawfully engaging in a profession in such other state.

Third Defense

Defendant further moves that said complaint be dismissed because Sec. 67-7-13, N.M.S.A. 1953 Comp., has no reasonable relation to the maintenance of public health of citizens [fol. 14] of the State of New Mexico and unreasonably discriminates against this defendant and to enforce same would deny said defendant equal protection of the law and deprive it of property without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States and Sec. 18, Article II, of the Constitution of the State of New Mexico.

Fourth Defense

Defendant moves that said complaint be dismissed on the grounds that the complaint shows on its face that this defendant is engaged in interstate commerce and such statute imposes an undue burden on, and discriminates against such commerce and that it imposes an arbitrary and unreasonable imposition on this defendant's privilege of doing business and deprives it of its property without due process of law.

Wherefore defendant prays that the plaintiff's complaint be dismissed and that it have and recover its costs herein

expended, and for such other relief as to the court upon the trial of this cause may deem proper in the premises.

Williams, Johnson & Houston, By Theodore R. Johnson, P. O. Box 1926, Hobbs, New Mexico, Attorneys for Defendant, Permian Basin Radio Corporation.

Certificate of Service (omitted in printing).

[fol. 15]

IN THE DISTRICT COURT OF LEA COUNTY

DECREE—January 4, 1961

This Cause came on to be heard on the 4th day of January, 1961; Plaintiff being represented by the Attorney General of New Mexico and by Robert F. Pyatt, Special Assistant Attorney General, and no one appearing for Defendant Abner Roberts; and it appearing to the Court that Defendant Abner Roberts was personally served with process in the State of Texas as provided by law; and Defendant Abner Roberts having failed to appear or answer the Complaint as required by law; and after examining the file and hearing the proff (sic) of Plaintiff, the Court finds:

1.

The allegations contained in Plaintiff's Complaint as to defendant Abner Roberts are true and the Court adopts such allegations as its findings of fact.

2.

Judgment should be entered as follows:

—Enjoining and restraining Defendant Abner Roberts from advertising by any means whatsoever, within the State of New Mexico, the quotation of any prices or terms on eyeglasses, spectacles, lenses, frames or mountings or which quotes discounts to be offered on eyeglasses, spectacles, lenses, frames or mountings, or which in any other manner is violative of the provisions of Sec. 67-7-13 (m), [fol. 16] N.M.S.A., 1953, Compilation.

It Is Therefore Ordered, Adjudged and Decreed as follows:

Defendant Abner Roberts is hereby enjoined and restrained from advertising by any means whatsoever, within the State of New Mexico, the quotations of any prices or terms on eyeglasses, spectacles, lenses, frames or mountings, or which quotes discounts to be offered on eyeglasses, spectacles, lenses, frames or mountings, or which in any other manner is violative of the provisions of Sec. 67-7-13 (m) N.M.S.A., 1953 Compilation.

John R. Brand

[fol. 17]

IN THE DISTRICT COURT OF LEA COUNTY

MOTION FOR SUMMARY JUDGMENT—Filed January 12, 1961

Plaintiffs respectfully move the Court for a summary judgment based on the pleadings, and as grounds therefor state:

1.

There is no genuine issue as to any material fact.

Robert F. Pyatt, Special Assistant Attorney General,
for Plaintiff.

Certificate of Service (omitted in printing).

[fol. 18]

IN THE DISTRICT COURT OF LEA COUNTY

AMENDED SEPARATE ANSWER OF DEFENDANT KWEW, INC.—
Filed January 17, 1961

Comes Now Defendant KWEW, Inc., and by agreement with plaintiff's attorney to file this amended separate answer, by its attorney, L. George Schubert, of Hobbs, New Mexico, states:

First Defense

Defendant moves the court to dismiss this action because the Complaint fails to state a cause of action against this defendant upon which relief can be granted.

Second Defense

Defendant moves the Court to dismiss this action because the Court lacks jurisdiction of the subject matter of the action for the reason that it appears on the face of the Complaint that defendant Roberts practices optometry in the State of Texas and is outside the jurisdiction of this Court and the statutes and laws made and provided are inapplicable to this defendant accepting advertising from a resident of another state lawfully engaging in a profession in said state.

Third Defense

Defendant further moves that said Complaint be dismissed because Sec. 67-7-13, N.M.S.A., 1953 Comp., has no reasonable relation to the maintenance of public health of citizens of the State of New Mexico and unreasonably discriminates against this defendant and to enforce same would deny said defendant equal protection of the law and deprive it of property without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States and Sec. 18, Article II, of the Constitution of the State of New Mexico.

Fourth Defense

Defendant moves that said Complaint be dismissed on the grounds that the Complaint shows on its face that this defendant is engaged in interstate commerce and such statute imposes an undue burden on and discriminates against such commerce and that it imposes an arbitrary and unreasonable imposition on this defendant's privilege of doing business and deprives it of its property without due process of law.

Wherefore, defendant moves that plaintiff's Complaint be dismissed.

L. George Schubert, P. O. Box 185, Hobbs, New Mexico, Attorney for Defendant KWEW, Inc.

Certificate of Service (omitted in printing).

[fol. 20]

IN THE DISTRICT COURT OF LEA COUNTY

AFFIDAVIT OF SERVICE OF DECREE—Filed January 20, 1961

THE STATE OF TEXAS,
COUNTY OF GAINES, SS.

I, H. F. Bell, being first duly sworn, on oath, state: That I am a citizen of the United States and over the age of eighteen years, and not a party of said action; that I have made service of one certified copy of Decree entered in the above matter against Defendant Abner Roberts by delivering same to Defendant Abner Roberts on the 11th day of January, 1961.

H. F. Bell, Affiant

Subscribed and Sworn to before me this 11th day of January, 1961.

Joyce C. Pate, Notary Public, Gaines County, Texas.

My commission expires June 1, 1961.

Came to hand on the 11 day of Jan., A. D., 1961 at 11:30 o'clock A. M., and executed by me on the 11th day of Jan., A. D., 1961, at 1:55 o'clock P. M. I actually and necessarily traveled 50 miles in the service of this writ.

Fees:

Serving cop-- \$1.25

Mileage 50 at .10 5.00

Total \$6.25

Floyd Taylor, Sheriff, Gaines County, Texas, by
H. F. Bell.

[fol. 21]

IN THE DISTRICT COURT OF LEA COUNTY

DEFENDANTS REQUESTED FINDINGS OF FACT AND
CONCLUSIONS OF LAW—Filed March 17, 1961

Comes Now the defendants, Agnes Head, d/b/a Lea County Publishing Co., Permian Basin Radio Corporation, and KWEW, Inc., and request the Court to make the following findings of fact:

I.

That Agnes Head is owner and publisher of the Hobbs Flare a weekly newspaper published in Hobbs, Lea County, New Mexico, and has a second class mailing permit issued by the United States Postal Department; such paper has a circulation in thirteen states and the District of Columbia and subscribers in thirty cities, towns, and villages in Central West Texas.

II.

That Permian Basin Radio Corporation, owner of station KHOB in Hobbs, Lea County, New Mexico, and KWEW, Inc., a radio station in Hobbs, Lea County, New Mexico, are licensed and regulated by the Federal Communications Commission of the United States with radio coverage and program reception in at least ten counties in Central West Texas.

III.

That the Hobbs Flare, KWEW and KHOB receive and disseminate local, regional, and national news coverage and [fol. 22] paid advertising with such regional advertising and news being concentrated in adjacent counties in New Mexico and Central West Texas, specifically the following cities in Texas, to-wit:

Denver City, Andrews, Seminole, Seagraves, Brownfield, Kermit, Bledsoe, and Plains.

IV.

That the Defendant newspaper and radio stations severally contracted with Dr. Abner Roberts, a duly licensed and lawfully engaged optometrist in the state of Texas, a resident of Gaines County Texas, practicing exclusively in said county to advertise his offer to prescribe, fit, and sell at quoted prices eyeglasses, spectacles, lenses, frames or mountings at his place of business in Gaines County, Texas.

REQUESTED CONCLUSIONS OF LAW

Comes Now defendants, Agnes Head d/b/a Lea County Publishing Co., Permian Basis (sic) Radio Corporation, and KWEW, Inc. and respectfully request the Court to make the following conclusions of law:

I.

Defendant, Dr. Abner Roberts does not engage in the practice of optometry in the state of New Mexico, and his activities are beyond the jurisdiction of the laws and statutes of this state.

II.

That Section 67-7-3, N. M. S. A., 1953 Compilation, the statute upon which this action is based, is inapplicable to defendants accepting advertising from a resident of another state lawfully engaged in a profession in such other state, because such statute violates the provisions of Article I, Section 8, Paragraph 3, of the Constitution of the United States, relating to interstate commerce.

[fol. 23].

III.

That Section 67-7-3, N.M.S.A., 1953 Compilation is an unreasonable infringement of personal property rights and an unwarranted oppressive interference with the liberty of contract and violates the 14th Amendment to the Consti-

tution of the United States and Section 18, Article 2, of the Constitution of the State of New Mexico.

Respectfully,

Williams, Johnson, and Houston, By: Theodore R. Johnson, Box 1926, Hobbs, New Mexico, Attorneys for Defendant, Permian Basin Radio Corporation; and

L. George Schubert, Box 185, Hobbs, New Mexico, Attorney for Defendants, Agnes K. Head and KWEW, Inc., a corporation.

Certificate of Service (omitted in printing).

[fol. 24]

IN THE DISTRICT COURT OF LEA COUNTY

PLAINTIFF'S REQUESTED FINDINGS OF FACT AND
CONCLUSIONS OF LAW—Filed March 24, 1961

Plaintiff respectfully request (sic) the Court to make the following findings of fact:

1.

Plaintiff is an agency of the State of New Mexico and brings this suit in its official capacity. Defendant Roberts is a resident of the State of Texas. Defendant Agnes K. Head is a resident of Lea County, New Mexico, and does business in such county as Lea County Publishing Company, publishing the "Hobbs Flare", a newspaper in Hobbs, New Mexico. Defendants Permian Basin Radio Corporation and KWEW, Inc. are corporations authorized to transact business in New Mexico, and each operates a radio transmitting station in Hobbs, Lea County, New Mexico.

2.

Defendant Roberts practices optometry in Gaines County, Texas. This practice is conducted just across the New Mexico-Texas boundary, a few miles east of Hobbs, New Mexico.

3.

Defendant Roberts has for some period of time conducted radio and newspaper advertising through the news media of [fol. 25] the other defendants in this case. Such advertising consists of the quotations of prices on eyeglasses and spectacles and of the quotation of discounts to be offered on eyeglasses and spectacles. This advertising is published by the other defendants, which publishing originates in Hobbs, Lea County, New Mexico.

4.

This advertising will be continued, unless permanently enjoined.

5.

All defendants with the exception of defendant Abner Roberts have been personally served with process within the State of New Mexico.

REQUESTED CONCLUSIONS OF LAW

Plaintiff respectfully requests the Court to make the following conclusions of law:

1.

By virtue of the terms of Section 67-7-4, N.M.S.A. 1953 Comp., as amended, it is the duty of plaintiff to administer those statutes of the State of New Mexico pertaining to the practice of optometry, compiled as Sections 67-7-1 to 67-7-14, N.M.S.A. 1953 Comp., both inclusive as amended.

2.

The advertising done by the defendant Roberts and published through the newspaper and radio media of the other defendants in this case is directly in violation of Section [fol. 26] 67-7-13, N.M.S.A., 1953 Comp., which is one of the statutes required to be administered by plaintiff.

3.

The publication of the advertising by the defendants in this cause constitutes a violation of Section 67-7-13, N.M.S.A., 1953 Comp.

4.

The defendants in this case, other than defendant Roberts, in publishing such advertising, are within the jurisdiction of the laws of the State of New Mexico, and are within the jurisdiction of this Court, and are amenable to its process.

5.

The defendants in this case, other than defendant Roberts, in publishing such advertising, are aiding and abetting in, and encouraging the violation of Section 67-7-13, N.M.S.A., 1953 Comp., and such conduct by them should be permanently enjoined.

6.

The enforcement of Section 67-7-13, N.M.S.A. 1953, (sic) Comp., by enjoining the defendants, other than defendant Roberts, from aiding and abetting in the violation of this section does not offend either the Constitution of the United States or the Constitution of New Mexico.

7.

The granting of injunctive relief against all defendants, other than defendant Roberts, is not affected by the fact that defendant Roberts is a resident of Gaines County, Texas.

[fol. 27]

8.

The provisions of Section 67-7-13, N.M.S.A. 1953 Comp., prohibiting certain price advertising and discount advertising are a valid exercise by the legislature of the State of New Mexico of the police power, having been enacted in protection of the public health and welfare. These provi-

sions do not offend either the Constitution of the United States or the Constitution of the State of New Mexico.

9.

Plaintiff has no plain, speedy or adequate remedy at law, and injunctive relief is necessary.

Respectfully submitted,

Robert F. Pyatt, Special Assistant Attorney General.

Certificate of Service (omitted in printing).

[fol. 28]

IN THE DISTRICT COURT OF LEA COUNTY

Decision of the Court—March 28, 1961

The Court makes the following

FINDINGS OF FACT

1. Plaintiff is an agency of the State of New Mexico and brings this suit in its official capacity. Defendant Roberts is a resident of the State of Texas. Defendant Agnes K. Head is a resident of Lea County, New Mexico, and does business in such county as Lea County Publishing Company, publishing the "Hobbs Flare", a newspaper in Hobbs, New Mexico. Defendants Permian Radio Corporation and KWEW, Inc. are corporations authorized to transact business in New Mexico, and each operates a radio transmitting station in Hobbs, Lea County, New Mexico.

2. Defendant Roberts practices optometry in Gaines County, Texas. This practice is conducted just across the New Mexico-Texas boundary, a few miles east of Hobbs, New Mexico.

3. Defendant Roberts has for some period of time conducted radio and newspaper advertising through the news media of the other defendants in this case. Such advertising consists of the quotation of prices on eyeglasses and spectacles and of the quotation of discounts to be

offered on eyeglasses and spectacles. This advertising is [fol. 29] published by the other defendants, which publishing originates in Hobbs, Lea County, New Mexico.

4. This advertising will be continued, unless permanently enjoined.

5. All defendants with the exception of Defendant Abner Roberts have been personally served with process within the State of New Mexico.

The Court adopts the following

CONCLUSIONS OF LAW

1. By virtue of the terms of Section 67-7-4, N. M. S. A. 1953 Comp., as amended, it is the duty of plaintiff to administer those statutes of the State of New Mexico pertaining to the practice of optometry, compiled as Sections 67-7-1 to 67-7-14, N.M.S.A. 1953 Comp., both inclusive as amended.

2. The advertising done by the Defendant Roberts and published through the newspaper and radio media of the other defendants in this case is directly in violation of Section 67-7-13, N.M.S.A. 1953 Comp., which is one of the statutes required to be administered by the plaintiff.

3. The publication of the advertising by the defendants in this cause constitutes a violation of Section 67-7-13, N.M.S.A. 1953 Comp.

4. The defendants in this case, other than defendant Roberts, in publishing such advertising, are within the [fol. 30] jurisdiction of the laws of the State of New Mexico, and are within the jurisdiction of this Court, and are amenable to its process.

5. The defendants in this case, other than defendant Roberts, in publishing such advertising, are aiding and abetting in, and encouraging the violation of Section 67-7-13, N.M.S.A. 1953 Comp., and such conduct by them should be permanently enjoined.

6. The enforcement of Section 67-7-13, N.M.S.A. 1953, Comp., by enjoining the defendants, other than defendant

Roberts, from aiding and abetting in the violation of this section does not offend either the Constitution of the United States or the Constitution of New Mexico.

7. The granting of injunctive relief against all defendants, other than defendant Roberts, is not affected by the fact that defendant Roberts is a resident of Gaines County, Texas.

8. The provisions of Section 67-7-13, N.M.S.A., 1953, Comp., prohibiting certain price advertising and discount advertising are a valid exercise by the Legislature of the State of New Mexico of the police power, having been enacted in protection of the public health and welfare. These provisions do not offend either the Constitution of the United States or the Constitution of New Mexico.

9. Plaintiff has no plain, speedy, or adequate remedy at law, and injunctive relief is necessary.

All requested findings of fact and conclusions of law [fol. 31] submitted by the parties and not adopted are hereby refused.

Done This the 28th day of March, 1961.

John R. Brand, District Judge.

[fol. 32]

IN THE DISTRICT COURT OF LEA COUNTY

FINAL DECREE—Filed April 7, 1961

This Cause came on to be heard on the 19th day of January, 1961, defendants Agnes K. Head, d/b/a Lea County Publishing Co., and KWEW, Inc., being represented by L. George Schubert, and defendant Permian Basin Radio Corporation being represented by Theodore R. Johnson of Williams, Johnson & Houston; and plaintiff being represented by the Attorney General of New Mexico and by Robert F. Pyatt, Special Assistant Attorney General; and the parties having entered into stipulations herein

as to the facts of the case and the Court having made and filed its Findings of Fact and Conclusions of Law.

1.

The Court has jurisdiction of the subject matter and of defendants Agnes K. Head, d/b/a Lea County Publishing Co., KWEW, Inc., and Permian Basin Radio Corporation, and of plaintiff New Mexico Board of Examiners in Optometry; that judgment should enter for the plaintiff granting the injunctive relief prayed for in its complaint against said defendants.

It Is, Therefore, Ordered, Adjudged, and Decreed as follows:

[fol. 33] Defendants Agnes K. Head, d/b/a Lea County Publishing Co., KWEW, Inc., and Permian Basin [sic] Radio Corporation are hereby perpetually enjoined and restrained from accepting or publishing within the State of New Mexico advertising of any nature from Abner Roberts which quotes prices or terms on eyeglasses, spectacles, lenses, frames, or mountings or which quotes discounts to be offered on eyeglasses, spectacles, lenses, frames or mountings or which quotes moderate prices, low prices, lowest prices, guaranteed glasses, satisfaction guaranteed, or words of similar import, as prohibited by the provisions of Section 67-7-13(m), 1953 Compilation, to all of which the defendants object and except.

John R. Brand, District Judge.

Submitted:

Robert F. Pyatt, Special Assistant Attorney General.

L. George Schubert, Attorney for Agnes K. Head, d/b/a Lea County Publishing Co., and KWEW, Inc.

Theodore R. Johnson, Attorney for Permian Basin Radio Corporation.

[fol. 34]

IN THE DISTRICT COURT OF LEA COUNTY

MOTION FOR APPEAL—Filed April 21, 1961

Come Now defendants Agnes Head, d/b/a Lea County Publishing Co., Permian Basin Radio Corporation, and KWEW, Inc., and move the Court for an order allowing appeal in this cause, and in support of such motion, respectfully show to the Court:

That they, and each of them, feel aggrieved by the judgment of the District Court of Lea County in favor of the plaintiff in the above cause and desire to appeal the same to the Supreme Court of the State of New Mexico.

Wherefore, defendants pray that they be granted an appeal to the Supreme Court of the State of New Mexico from the judgment entered in the above cause.

L. George Schubert, P. O. Box 185, Hobbs, New Mexico, Attorney for defendants Agnes Head, d/b/a Lea County Publishing Co. and KWEW, Inc.

Williams, Johnson & Houston, By Theodore R. Johnson, P. O. Box 1926, Hobbs, New Mexico, Attorneys for Permian Basin Radio Corporation.

Certificate of Service (omitted in printing).

[fol. 35]

IN THE DISTRICT COURT OF LEA COUNTY

ORDER ALLOWING APPEAL—April 19, 1961

Now on this day the above styled and numbered cause came on to be heard on the motion of the defendants Agnes Head, d/b/a Lea County Publishing Co., Permian Basin Radio Corporation, and KWEW, Inc., for an order permitting an appeal to the Supreme Court of the State of New Mexico from the judgment entered in favor of the plaintiff therein, and the Court, after reading said motion

and being fully advised in the premises, finds that said appeal should be granted.

It Is, Therefore, Considered and Ordered by the Court that said defendants be, and they are hereby allowed an appeal to the Supreme Court of the State of New Mexico from the judgment entered in the above styled cause.

Done in Open Court this 19 day of April, 1961.

John R. Brand, District Judge.

Certificate of Service (omitted in printing).

[fol. 36]

IN THE DISTRICT COURT OF LEA COUNTY

NOTICE OF APPEAL—Filed May 8, 1961

To: New Mexico Board of Examiners in Optometry and Robert F. Pyatt, its attorney.

You Are Hereby Notified that by Order dated the 19th day of April, 1961, the Court granted defendants Agnes Head, d/b/a Lea County Publishing Co., Permian Basin Radio Corporation, and KWEW, Inc., an appeal from the final judgment entered in the above entitled and numbered cause.

This notice is given in addition to the notice given Robert F. Pyatt on April 23, 1961.

Dated this 6th day of May, 1961.

L. George Schubert, P. O. Box 185, Hobbs, New Mexico, Attorney for defendants Agnes Head d/b/a Lea County Publishing Co., and KWEW, Inc.

and

Williams, Johnson & Houston By: Theodore R. Johnson, P. O. Box 1926, Hobbs, New Mexico, Attorneys for Permian Basin Radio Corporation.

Certificate of Service (omitted in printing).

[fol. 38]

IN THE DISTRICT COURT OF LEA COUNTY

PRAECIPE FOR RECORD—Filed May 8, 1961

W. M. Beauchamp
 Clerk of the District Court
 Lovington, New Mexico

Dear Sir:

You will please prepare a complete record of the above entitled and numbered cause for the purpose of an appeal to the Supreme Court of the State of New Mexico, including therein the following:

- (a) All Pleadings
- (b) All Orders and Judgments of the Court
- (c) All Requested Findings of Fact and Requested Conclusions of Law
- (d) Decisions of the Court
- (e) All stipulations and oral evidence introduced at the trial
- (f) All Exhibits
- (g) Reporter's Transcript of all Proceedings not filed of record
- (h) Motion and Order Granting Appeal
- (i) Notice of Appeal
- (j) Clerk's Certificate
- [fol. 39] (k) Reporter's Certificate
- (l) All other instruments and matters necessary to obtain a complete record for the purposes of appeal to the Supreme Court of the State of New Mexico
- (m) Your Cost Bill

Dated This 6th day of May, 1961.

L. George Schubert, P. O. Box 185, Hobbs, New Mexico, Attorney for defendants Agnes Head d/b/a Lea County Publishing Co., and KWEW, Inc.

and

Williams, Johnson & Houston, By Theodore R. Johnson, P. O. Box 1926, Hobbs, New Mexico, Attorneys for Permian Basin Radio Corporation.

Certificate of Service (omitted in printing).

[fol. 40]

IN THE DISTRICT COURT OF LEA COUNTY

CLERK'S AND REPORTER'S CERTIFICATE AS TO COSTS

We, the undersigned W. M. Beauchamp, Clerk of the District Court, Fifth Judicial District in and for the County of Lea, State of New Mexico, and Ray Crowder, Official Court Reporter thereof, do, individually and severally, hereby certify and acknowledge that satisfactory arrangements have been made by the defendants-appellants, Agnes K. Head, d/b/a Lea County Publishing Co., Permian Basin Radio Corporation, and KWEW, Inc., for payment of costs and compensation for preparation of the Transcript of Record on the appeal from the Order dated 19th day of April, 1961, and entered and filed herein on the 21st day of April, 1961.

Witness our hands and the seal of the Clerk of the District Court on this 28th day of June, 1961.

W. M. Beauchamp, Clerk of the District Court.

Ray Crowder, Official Court Reporter.

[fol. 41]

IN THE DISTRICT COURT OF LEA COUNTY

WAIVER OF NOTICE RE BILL OF EXCEPTIONS—

Filed June 28, 1961

Comes Now the Plaintiff, by Robert F. Pyatt, Esquire, its attorney, and hereby waives the usual five days notice of intention to apply for an order signing and sealing the Bill of Exceptions herein, and consents that the same may be entered at anytime within return date when presented by the Attorneys for the Defendants.

Robert F. Pyatt, Special Assistant Attorney General,
Attorney for Plaintiff, Hobbs, New Mexico.

[fol. 43]

IN THE DISTRICT COURT OF LEA COUNTY

STATE OF NEW MEXICO

[Title omitted]

Transcript of Proceedings

Be It Remembered that the above entitled and numbered cause came on to be heard before the Honorable John R. Brand, District Judge in and for the Fifth Judicial District, Division III, State of New Mexico, on Thursday, January 19, 1961, in the District Court of Lea County, State of New Mexico; the Plaintiff appearing through its attorney, Assistant Attorney General, Robert F. Pyatt, Esquire; Defendants Agnes K. Head and KWEW, Inc. appearing through their attorney, L. George Schubert, Esquire, Hobbs, New Mexico; Defendant Permian Basin Radio Corporation appearing through its attorney, Theodore R. Johnson, Esquire, of Williams, Johnson & Houston, Hobbs, New Mexico; Defendant Abner Roberts not appearing; both sides announcing ready for trial, the following occurred, to-wit:

[fol. 44]

STIPULATION OF FACTS

By Mr. Pyatt: If the Court please, Mr. Johnson and I have a stipulation at this time.

By Mr. Johnson: It is hereby stipulated by and between the State of New Mexico, acting by and through its attorney, Robert F. Pyatt, and the Permian Basin Radio Corporation acting by and through its attorney, Theodore R. Johnson, that the Permian Basin Radio Corporation owns and operates Radio Station KHOB in Hobbs, New Mexico; that the Radio Station is a regional station; has coverage both in the State of New Mexico and the State of Texas, and that an area map prepared by Guy C. Hutchins, Consulting Radio Engineer of Arlington, Texas, for KHOB will be introduced in evidence, will (sic) admitted in evidence, and that KHOB has the coverage as shown by the map; and that further that at all times material hereto and that subsequent to the order enjoining the Defendant, Abner Roberts, that the Permian Basin Radio Corporation has accepted advertising from Abner Roberts, price advertising, and that it will continue to do so unless enjoined [fol. 45] by the Court. It is further stipulated that KHOB receives news coverage from Denver City, Seminole, Andrews, Seagraves, Brownfield, Kermit, Bledsoe and Plains, Texas; and that it handles advertising, spot advertising, from national advertising concerns; it is so stipulated that KHOB handles advertising for firms and merchants situated in the State of Texas.

By Mr. Pyatt: It is so stipulated, Your Honor, no objection to Mr. Johnson's stipulation.

By Mr. Schubert: Here is a written stipulation for the defendants I represent.

By Mr. Johnson: If there is anything in that stipulation that is not covered in mine, I would like for it to cover mine, also.

By Mr. Pyatt: No objection.

Whereupon, counsel presented argument to the Court and the following occurred:

MEMORANDUM OF COURT

By the Court: The Legislature of New Mexico passed an act prohibiting the advertisement in any form of prices of various paraphernalia sold by optometrists. That is a justifiable and reasonable exercise of the police power, for obvious reasons. Optometry is a science dealing with the public-health, and it is quite permissible that the State regulate it so as to attempt to insure that it be conducted in an ethical manner without competition (sic) attending on the sale of other goods. The Defendant Roberts is a non-resident of the State of New Mexico and beyond the jurisdiction of this Court, and his activities cannot be controlled by this Court. The three other defendants engage in disseminating news, advertising matter, by newspaper and radio. They are residents of this State and within its jurisdiction. Conceding (sic) that Roberts's (sic) acts are illegal and in violation of our law, I can see no persuasive reason why the defendants should not be restrained from aiding and abetting him in the illegal act. I do not think that either Little vs. Smith nor the Utah Case are in point. There, it was permissible to sell the items under certain licensing regulations. But, the State undertook to [fol. 47] prevent advertisement by the merchants of the fact that they had these items for sale, for legal sale. Here, it is illegal to price-advertise these items. There is no provision whereby it can be made legal. These defendants are engaged in a conspiracy to assist the Defendant Roberts in violating a law of the State of New Mexico. It so happens that in a neighboring state, there is no such act. But, the State of New Mexico is not prohibited from doing what it can to protect its citizens (sic) because the State of Texas does not see fit to take similar action. The injunction will issue to the other three defendants as prayed.

[fol. 48]

IN THE DISTRICT COURT OF LEA COUNTY
STATE OF NEW MEXICO

[Title omitted]

STIPULATION AS TO EXHIBITS

It is hereby stipulated and agreed between plaintiff, through its attorney, Robert F. Pyatt, and defendant Agnes K. Head, d/b/a Lea County Publishing Co. and defendant KWEW, Inc., through their attorney George L. [sic] Schubert of Hobbs, New Mexico, as follows:

The following instruments shall be admitted in evidence as defendants' exhibits, to-wit:

1. Coverage Chart prepared by The Branham Company, as Exhibit "A"
2. A five-page mimeographed [sic] Memorandum styled "How K-W-E-W RADIO SERVES THE PEOPLE with POWER plus PROGRAMS", as Exhibit "B"
3. Circulation List of the Hobbs Flare, as Exhibit "C"

It Is Further Stipulated and Agreed that if Harry McAdams, Manager of KWEW, Inc. was present [sic] in court as a witness that he would testify substantially [fol. 49] as follows:

KWEW, Inc. receives communications regarding its radio programs from Denver City, Texas, Andrews, Texas, Seminole, Texas, Seagraves, Texas, Lamesa, Texas and other towns and cities in West Texas, and if Mrs. Head, owner of the Lea County Publishing Co. was present in court as a witness that she would testify

That The Hobbs Flare has a Second Class Mailing Permit issued by the United States Postal Department.

It Is Further Stipulated and Agreed that both said defendants have accepted price ads from defendant Abner Roberts over the telephone and have done so since this

suit was instituted and unless restrained by the court will continue to do so in the future if such price ads are offered by Roberts.

Robert F. Pyatt, Special Assistant Attorney General, P. O. Box 638, Hobbs, New Mexico, Attorney for Plaintiff.

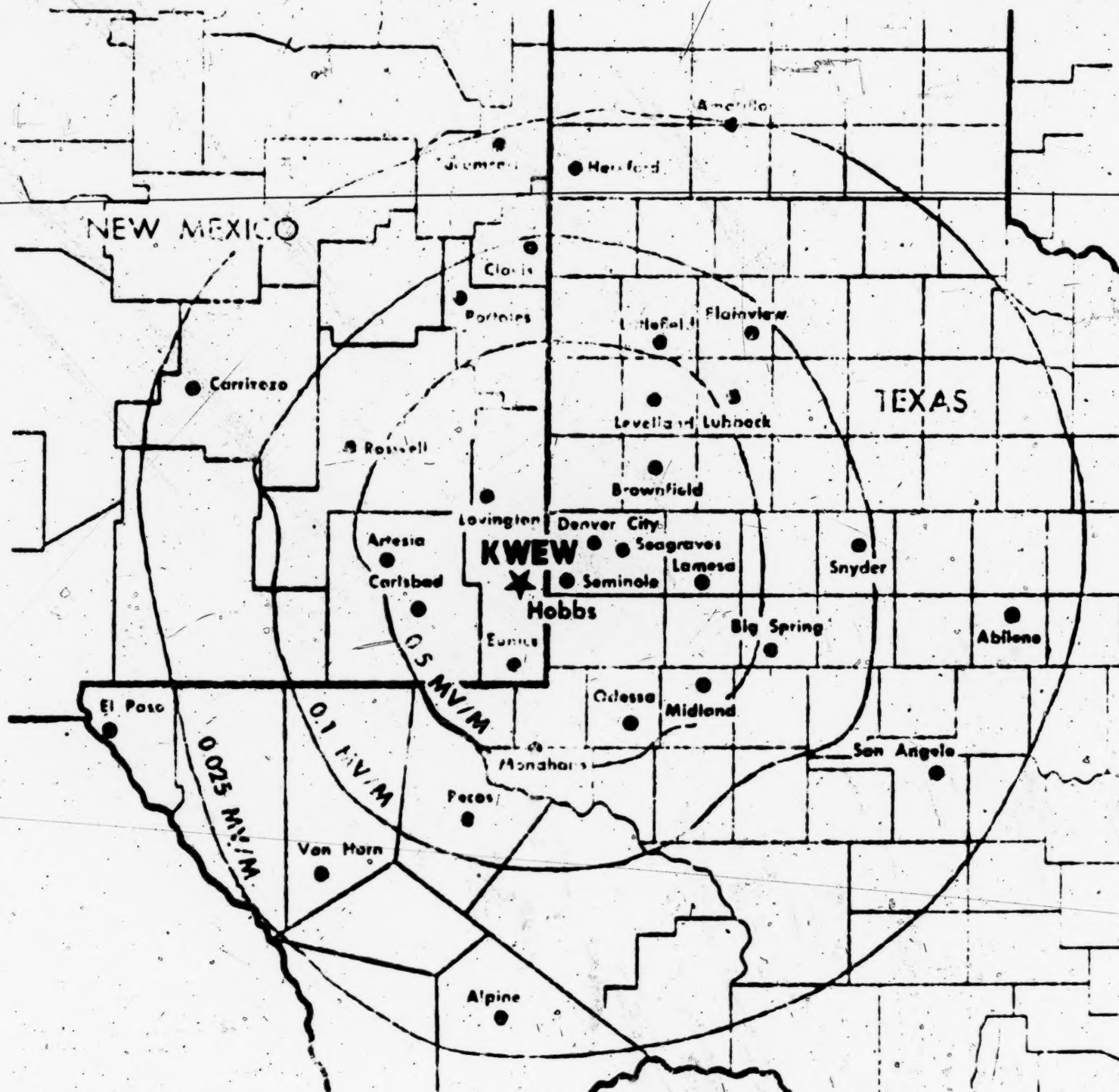
L. George Schubert, P. O. Box 185, Hobbs, New Mexico, Attorney for Defendants Agnes K. Head d/b/a Lea County Publishing Co. and KWEW, Inc.

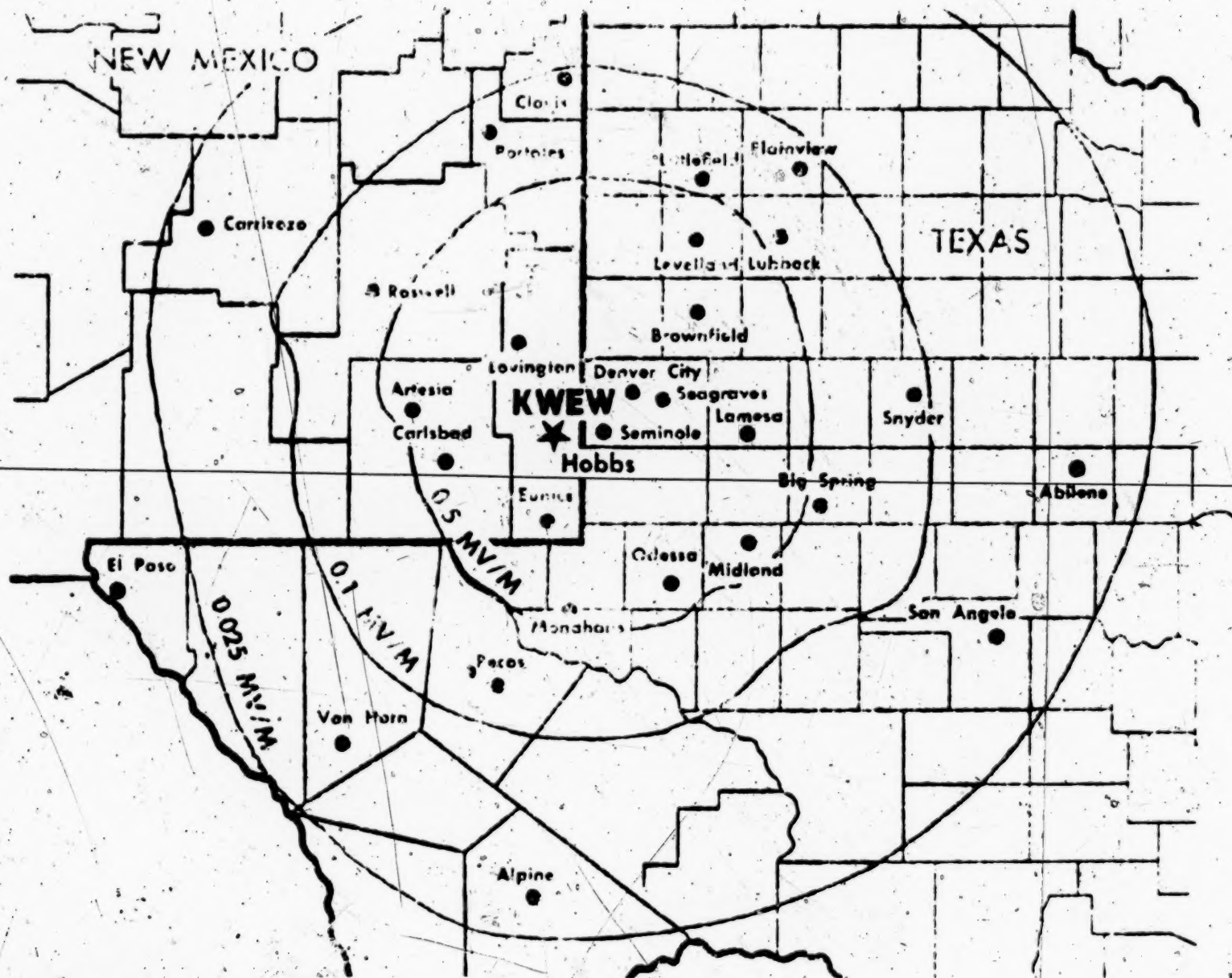
KWEW

1480 Kc

5,000 Watts

Hobbs, New Mexico





Regional coverage of one of the world's largest oil, potash, cattle and cotton producing kingdoms.

Radio Station KWEW
Hobbs, New Mexico
Telephone: EXpress 3-3137

Associated with Mutual Broadcasting System
Through Local, Regional and National Stations
News, Sport and National Events

Area Population	801,400
Radio Homes	200,700
Registered Automobiles	350,431
Annual Buying Power	\$782,730,000
(From Taxable Payrolls)	

THE BRANHAM COMPANY, NATIONAL REPRESENTATIVE

New York • Chicago • Detroit • St. Louis • Charlotte • Memphis • Atlanta • Dallas • L. A. • San Francisco

[fol. 51]

EXHIBIT B

HOW K-W-E-W RADIO SERVES THE PEOPLE

with

POWER plus PROGRAMS

[fol. 51A] K-W-E-W RADIO SPORTS

I. FOOTBALL—Approximately fifty (50) games each season.

a. High School

1. Hobbs High School complete schedule
2. Eunice, New Mexico, complete high school schedule

b. College

1. Approximately ten games from Southwest and Border Conferences.
2. Approximately ten games from New Mexico University and Service Academies.

c. Professional

1. Entire schedule of Baltimore Colts

d. Bowl Games

1. Sun Bowl
2. North-South All-Stars
3. World Championship Professional (NBC)
4. Sugar Bowl (NBC)
5. Rose Bowl (NBC)

II. BASKETBALL—Approximately seventy (70) games

a. High School

1. Entire Hobbs High School basketball schedule including state play-off
2. Entire Eunice High School basketball schedule including state play-off
3. Hobbs Holiday Basketball festival

b. College

1. Approximately 18 games from Texas Tech of Lubbock, Texas

c. All-Star-High School

1. New Mexico High School all-stars for both basketball and football in August each year.

III. BASEBALL—Approximately 160 games each season.

- a. Major League baseball—"Game of the Day"—Monday through Sunday
- b. Major League All-stars games in July and August through the facilities of the National Broadcasting Company.
- c. The World Series through the facilities of the National Broadcasting Company.

IV. TRACK

- a. Hobbs Relays are presented each year.

V. BOXING

- a. Hobbs Regional Golden Gloves and New Mexico State Golden Gloves are broadcast each year.
- b. World Heavyweight Championship fights (ABC)

VI. RACING

- a. Indianapolis 500 mile Speedway Race is broadcast from start to finish each year.
- b. Nascar Races

[fol. 51B]

K-W-E-W RADIO NEWS

I. LOCAL NEWS

- a. K-W-E-W provides the *only* local radio news service which actually gathers and reports local news. K-W-E-W news usually is ahead of all other media by 5 hours or more.

- b. Local newscasts are presented at 6:30 a.m., 7:30 a.m., 11:30 a.m., 12:15 p.m., 1:00 p.m., 3:00 p.m., 6:00 p.m. and 9:00 p.m.
- c. Local news commentary and personal interviews are presented each day at 12:45 p.m. on "Around the Town".
- d. "From the Scene" direct news reports are provided with the use of mobile radio units. K-W-E-W Radio has broadcast direct reports on everything from tornadoes to murder within minutes of the time it happened.

II. REGIONAL

- a. K-W-E-W Radio maintains telephone contact with the surrounding towns, Police Dept., Sheriff's Dept., State Police and Radar Weather Station.
- b. K-W-E-W Radio has 24 hour news service United Press International for Regional and Statewide coverage.

III. NATIONAL AND INTERNATIONAL NEWS

- a. K-W-E-W Radio is affiliated with the Mutual Broadcasting System and utilizes the news reporting of such well-known reporters as Robert Hurleigh, Gabriel Heatter, Lyle Van, Frank Singiser, Cedric Foster and Richard Rendell.
- b. From Mutual K-W-E-W Radio presents news commentary and personal interviews on "The World Today" and "Capitol Assignment".
- c. From the national and local scene, K-W-E-W presents ball scores and other sports news on "Sports Lineup" each day and through the "Bill Stern Sports Newsreel" (MBS).

[fol. 51C]

K-W-E-W RADIO PROGRAMMING

I. MUSIC

- a. K-W-E-W recognizes that only about 8% of the listening audience is a teen age audience; consequently, does not program "Rock and Roll" music all day and throughout the evening. For the "Teen-age audience, K-W-E-W Radio offers "Maxes Waxes" each day from 4:00-5:00 p.m. and Coca Cola's "Hi-Fi Club" from 4:00-5:00 p.m. on Saturdays.
- b. Popular music by the better known orchestras is offered throughout each morning for the benefit of the housewife and modern music is programmed for the afternoon. Music for the evening consists of offerings by the better dance bands.
- c. Country and Western Music is programmed each day at 11:00-12:00 on "Country Bandstand" and at 7:05-7:30 p.m. on "Bunkhouse Jamboree". Pet Milk's "Grand Old Opry" is carried each Friday at 11:30 a.m.
- d. K-W-E-W also programs race music for the approximately 6,000 negro audience and Spanish music on the Margo Maldonado Show from 5:00-6:00 a.m. for the Spanish speaking audience of some 12,000 to 15,000 persons.
- e. K-W-E-W Radio presents more music of all types than any other service in the area.

II. SPANISH LANGUAGE

- a. K-W-E-W Radio offers the *only* Spanish language service in Southeastern New Mexico and West Texas with its "Margo Maldonado Show" at 5:00-6:00 a.m. each day, "Mexico Lindo" at 10:30-11:00 a.m. on Sundays and "St. Helena's Ahora Catolico" on Sundays at 10:15-10:30 a.m.

III. RELIGION

- a. K-W-E-W believes in the power of radio to promote religious teaching and makes its facilities available to all beliefs. Presently, K-W-E-W Radio broadcasts the "Lutheran Hour", "Old Fashioned Revival Hour", "Revivaltime", "Voice of Prophecy", "Radio Bible Class" and a wide variety of local programs including Negro religious broadcasts.

IV. POLICY

- a. K-W-E-W Radio believes in expressing opinions and editorializes on national and local issues whenever necessary.
- b. K-W-E-W Radio believes that programming is the key to successful advertising; consequently, does *not* offer the same music at the same hours every day as an easy means of passing the time.
- [fol. 51D] c. While K-W-E-W Radio does not necessarily ridicule the use of surveys in markets the size of Hobbs, it does feel that surveys are used to sell advertising when *facts* about station service are absent and nonexistent. K-W-E-W Radio can point with pride to the many successful business firms in the area who have continuously used the K-W-E-W service for periods up to twenty years.
- d. K-W-E-W Radio contends that nighttime radio is necessary for the entertainment and service of the public and maintains the *only full time* radio service in Southeastern New Mexico and West Texas.

[fol. 52]

EXHIBIT C

THE HOBBS FLARE

CIRCULATION IN IMMEDIATE
TRADE TERRITORY:

Monahans, Texas
 Carlsbad, New Mexico
 Electra, Texas
 Luders, Texas
 Clyde, Texas
 Belen, New Mexico
 Wylie, Texas
 Amarillo, Texas
 Seminole, Texas
 Kermit, Texas
 El Paso, Texas
 San Antonio, Texas
 Denver City, Texas
 Abilene, Texas

Big Springs, Texas
 McCamey, Texas
 Childress, Texas
 Houston, Texas
 Richland Spgs., Texas
 Bonham, Texas
 Ft. Stockton, Texas
 Austin, Texas
 Odessa, Texas
 Midland, Texas
 Andrews, Texas
 Plains, Texas
 Lamesa, Texas
 Seagraves, Texas
 Higginbotham area on routes
 in Texas.

CIRCULATION BY STATES:


Arkansas
 Kansas
 Alaska
 Oklahoma
 Arizona
 New York
 Nevada

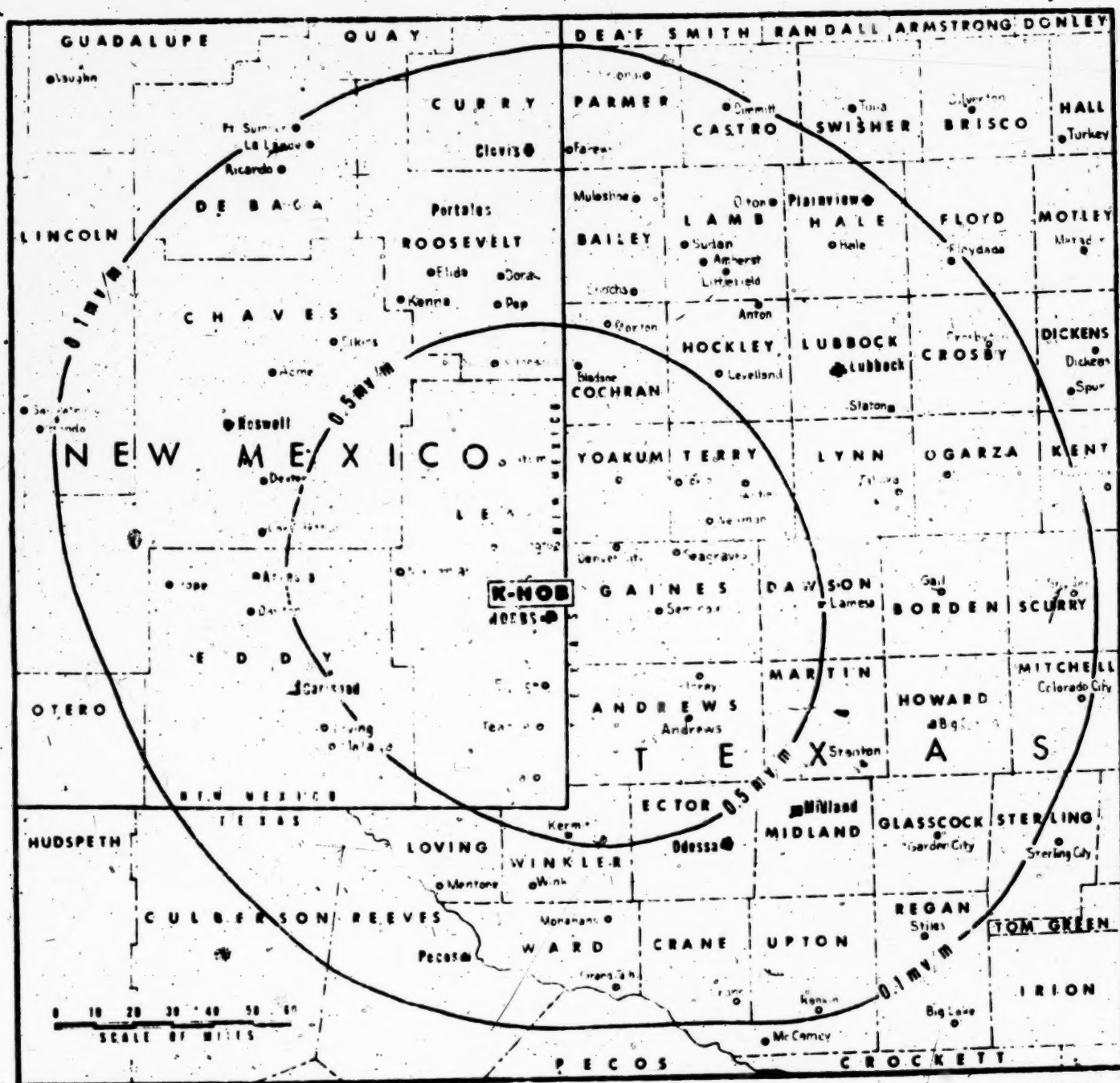
Colorado
 California
 Washington, D. C.
 Missouri
 Utah
 Wyoming
 Indiana

38

[fol. 53]

EXHIBIT No. 1

(See opposite) 

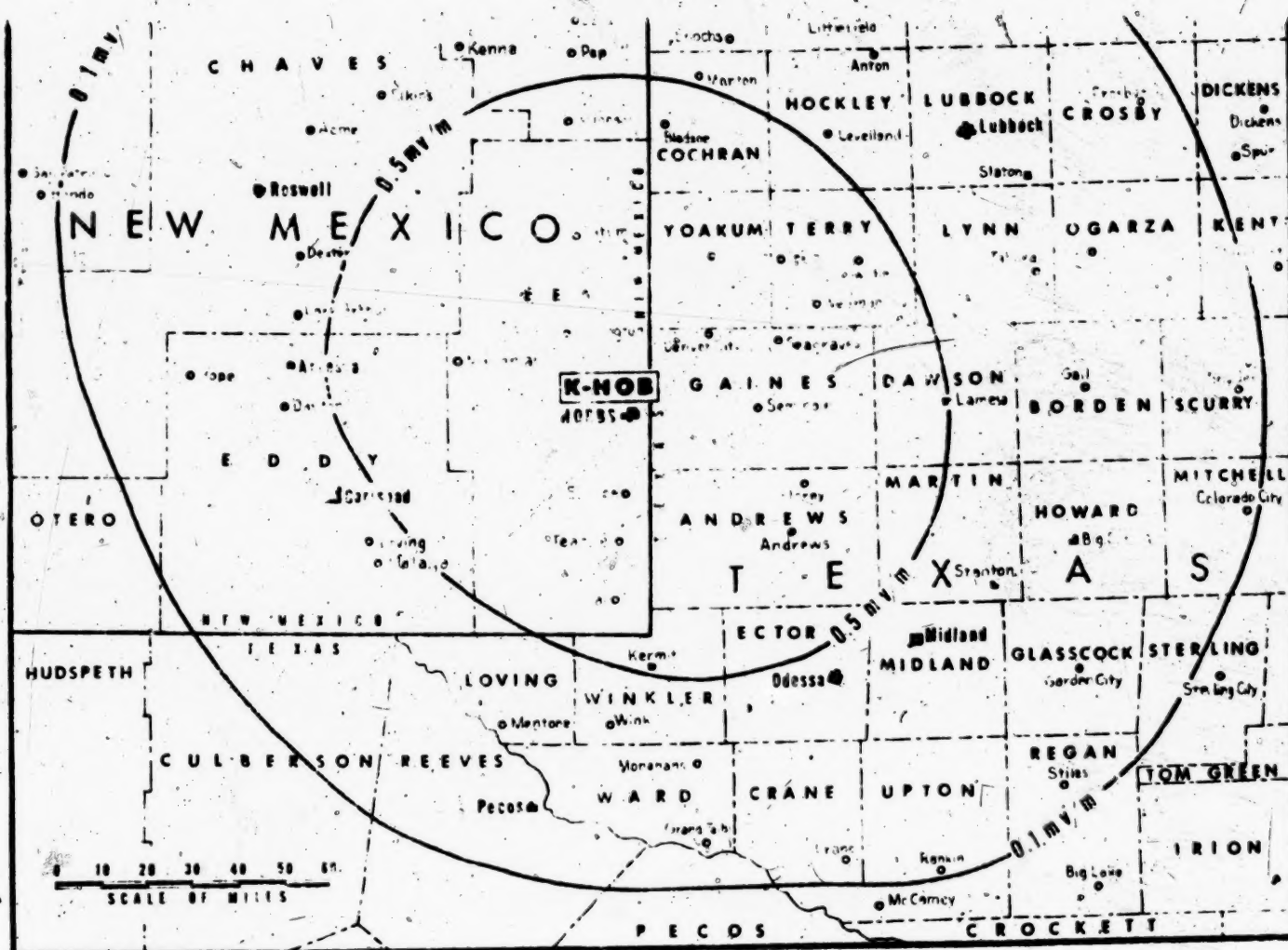


K-HOB *Hobbs, New Mexico*

Phone EA 3-5148 P. O. Box 247

7000 Hobbs

1000 Hobbs



K-HOB *Hobbs, New Mexico*

Phone ED 3-3148 P. O. Box 247

5000 Watts 63.90 Kilocycles

Defendant, Permian
Basin Radio Corp.
Exhibit # 1.



[fol. 54] REPORTER'S CERTIFICATE (omitted in printing).

[fol. 55]

IN THE DISTRICT COURT OF LEA COUNTY

STATE OF NEW MEXICO

[Title omitted]

ORDER SETTLING BILL OF EXCEPTIONS—June 30, 1961

On this 30 day of June, 1961, at the hour of nine o'clock A. M., appeared before me, the undersigned District Judge, the Defendants, by their attorneys, L. George Schubert, Esquire, of Hobbs, New Mexico, and Theodore R. Johnson, Esquire, of Williams, Johnson & Houston, Hobbs, New Mexico, and submits to be settled, signed and sealed by me the Bill of Exceptions in the above entitled cause; and it appearing from the record that Robert F. Pyatt, Esquire, Attorney for the Plaintiff, has waived the statutory five days notice of intention to apply for this Order, and no objections being made:

Now, Therefore, I, John R. Brand, Judge of the Fifth Judicial District of the State of New Mexico, do hereby [fol. 56] certify that I am the Judge who presided at the trial and entered the decision in this cause; that Ray Crowder was the official court reporter who reported said cause; that the annexed and foregoing transcript of proceedings and evidence, duly certified by said official court reporter, is the transcript of proceedings and evidence in said cause and contained with the records and exhibits therein referred to and identified and the matters therein contained, all of the testimony offered, given or introduced in said cause, all objections of the parties thereto, all rulings of the Court thereon, and all motions made by the parties, the rulings of the Court thereon, and the exceptions of the parties thereto during said trial.

And, inasmuch as the matters and things stated in the foregoing transcript are not of record in this cause, and

to the end that the same may become a part of the record on appeal to the Supreme Court in said cause,

It Is, Therefore, Ordered that the said official court reporter's transcript, consisting of pages 43 to 54, inclusive, as aforesaid, be filed as Defendants' Bill of Exceptions in said cause; and that said transcript be, and I hereby certify that the same is at this time signed, sealed, settled and delivered by the undersigned, presiding Judge of said Court, as the Bill of Exceptions on appeal in this cause.

John R. Brand, District Judge.

[fol. 57] COST CERTIFICATE (omitted in printing).

[fol. 58] CLERK'S CERTIFICATE TO FOREGOING TRANSCRIPT (omitted in printing).

[fol. 59]

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 7001

NEW MEXICO BOARD OF EXAMINERS IN OPTOMETRY,
Plaintiff-Appellee,

vs.

ABNER ROBERTS; AGNES K. HEAD, d/b/a LEA COUNTY
PUBLISHING CO.; PERMIAN BASIN RADIO CORPORATION;
and KWEW, Inc., Defendants-Appellants.

MOTION FOR AND ORDER EXTENDING TIME TO FILE BRIEF

Comes Now the defendants-Appellants, Agnes K. Head, d/b/a Lea County Publishing Co., and KWEW, Inc., by and through their attorney, L. George Schubert, and Permian Basin Radio Corporation, by and through its attorneys, Williams, Johnson & Houston, of Hobbs, New Mexico,

and move the court for an extension of time to August 31, 1961, in which to file the brief in chief in this cause.

L. George Schubert, Hobbs, New Mexico, Williams, Johnson & Houston, By Theodore R. Johnson, P.O. Box 1926, Hobbs, New Mexico, Attorneys for Defendants-Appellants.

Granted This 7th day of Aug. 1961, J.C.C., Chief Justice.

[fol. 60]

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

[Title omitted]

NOTICE OF EXTENSION OF TIME—Filed August 14, 1961

To: Robert F. Pyatt, P.O. Box 638, Hobbs, New Mexico, Attorney for New Mexico Board of Examiners in Optometry.

Notice Is Hereby Given that the Supreme Court of the State of New Mexico granted the defendants-Appellants until August 31, 1961, to file their brief in chief.

L. George Schubert, P. O. Box 185, Hobbs, New Mexico, Attorney for defendants Agnes Head, d/b/a Lea County Publishing Co., and KWEW, Inc. and Williams, Johnson & Houston, By Theodore R. Johnson P.O. Box 1926, Hobbs, New Mexico, Attorney for Permian Basin Radio Corporation.

Certificate of service (omitted in printing).

[fol. 61]

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

[Title omitted]

REQUEST FOR ORAL ARGUMENT—Filed August 31, 1961

The undersigned counsel for Defendants-Appellants in the above entitled cause hereby requests that the same be set down for oral argument.

Theodore R. Johnson, Counsel for Defendants-Appellants.

[fol. 126]

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 7001

Supreme Court of New Mexico

NEW MEXICO BOARD OF EXAMINERS IN OPTOMETRY,
Plaintiff-Appellee,

vs.

ABNER ROBERTS; AGNES K. HEAD, d/b/a LEA COUNTY
PUBLISHING CO.; PERMIAN BASIN RADIO CORPORATION;
and KWEW, Inc., Defendants-Appellants.

OPINION—Filed April 11, 1962

Appeal from the District Court of Lea County.

Brand, Judge.

Earl E. Hartley, Attorney General, Santa Fe, New
Mexico.

Robert F. Pyatt, Special Assistant Attorney General,
Hobbs, New Mexico.

Attorneys for Appellee.

L. George Schubert, Hobbs, New Mexico, Attorney
for Appellants Agnes K. Head & KWEW, Inc.

Williams, Johnson & Houston, Hobbs, New Mexico,
Attorneys for Appellant, Permian Basin Radio
Corp.

[fol. 127]

Compton, Chief Justice.

This is an appeal from a final decree, perpetually enjoining and restraining defendants Agnes K. Head, d/b/a Lea County Publishing Company, publisher of the newspaper Hobbs Flare; Permian Basin Radio Corporation, owner and operator of radio Station KHOB; and KWEW, Inc., owner and operator of radio station KWEW, all of Hobbs, New Mexico, from accepting, disseminating and publishing within the State of New Mexico advertising of any nature from defendant, Abner Roberts, a resident of Texas, which quotes prices or terms on eye glasses, spectacles, lenses, frames, or mountings, or quotes discounts to be offered on same, or which quotes moderate prices, or words of similar import, as prohibited by the provisions of Sec. 67-7-13, N.M.S.A. 1953.

The trial court found that the defendants, other than Roberts, in publishing the advertising, were aiding and abetting in and encouraging the violation of this section of the statute and that enjoining them from so doing does not offend either the Constitution of the United States or the Constitution of New Mexico.

The pertinent portions of the statute read as follows:

"67-7-13. OFFENSES-PENALTIES.—Each of the following acts on the part of any person shall constitute a misdemeanor and shall be punished by a fine of not less than \$50.00 nor more than \$200.00 or imprisonment in the county jail for not less than 30 days nor more than six (6) months, or both such fine and imprisonment for the first offense, and for a second offense a fine of not less than \$200.00 nor more than \$500.00, or imprisonment in the county jail for not less than 90 days nor more than one (1) year, or both

such fine and imprisonment. All fines thus received shall be paid into the common school fund of the county in which such conviction takes place.

“(m) Advertising by any means whatsoever the quotation of any prices or terms on eyeglasses, spectacles, lenses, frames or mountings or which quotes discount [fol. 128] to be offered on eyeglasses, spectacles, lenses, frames or mountings or which quotes ‘moderate prices,’ ‘low prices,’ ‘lowest prices,’ ‘guaranteed glasses,’ ‘satisfaction guaranteed,’ or words of similar import.”

Abner Roberts, a defendant below but not a party to this appeal, resides and practices optometry in Gaines County, Texas, located approximately 4 miles east of Hobbs, New Mexico, and in the trade area served by the news media of the other defendants who are the appellants here and who have their principal places of business in Hobbs, New Mexico. Roberts placed his advertisements with them by telephone.

It is conceded by appellants on this appeal that if Roberts were a resident of, or practicing optometry in, New Mexico the above statute would be applicable to and enforceable against him. But it is appellants' contention that because they are engaged in interstate commerce the statute upon which this action is based constitutes an obstruction on such commerce by restraining them from engaging in interstate commerce with a citizen of Texas lawfully practicing optometry in Texas and that, therefore, (1) the statute in question violates the provisions of Article I, Section 8, Paragraph 3 of the Constitution of the United States relating to interstate commerce; and (2) that it is an unreasonable infringement of personal property rights, an unwarranted oppressive interference with the liberty of contract and violates the Fourteenth Amendment of the Constitution of the United States and Article II, Section 18 of the Constitution of New Mexico.

It is the contention of the appellee, on the other hand, that the regulation of interstate commerce is not involved in this action since the New Mexico statute as well as the

decree of the court below seek only to control conduct in New Mexico in the legitimate exercise of its police power.

In support of appellants' first contention that this statute [fol. 129] violates the commerce clause in its application to them, appellants have cited cases which define interstate commerce and conclude that newspapers with circulation in other states, and radio stations whose programs are received in other states, are engaged in interstate commerce. We have no quarrel with the decisions in these cases insofar as they deal with the prohibition by a state of *all* advertising relating to a commodity moving in interstate commerce *into* its state from another state for legal sale in its original package, or with direct burdens on, or direct interference with, the publication and circulation of newspapers in interstate commerce or the privilege of doing business in interstate commerce, or with state statutes which conflict with federal legislation where Congress has fully occupied the field. But appellants have brought to our attention no authority for the proposition that persons engaged in interstate commerce are under no circumstances subject to valid legislation of the state in which they are doing business enacted in the exercise of its police power for the health and welfare of its citizens.

The Legislature of New Mexico enacted Section 67-7-13, *supra*, to protect its citizens against the evils of price-advertising methods tending to satisfy the needs of their pocketbooks rather than the remedial requirements of their eyes. That this is a valid exercise of the police power of the state is not questioned in this action and, in view of the decisions cited by appellee upholding the constitutionality of similar statutes in other states, we do not think it can be. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 75 S. Ct. 461; *Ritholz v. Indiana State Board of Registration and Examination in Optometry (USDC N.D. Ind.)*, 45 F. Supp. 423; *Abelson's Inc. v. New Jersey State Board of Optometrists*, 5 N.J. 412, 75 A. 2d 867; *City of Springfield v. Hurst*, 144 Ohio St. 49; 56 N.E. 2d [fol. 130] 185; *Commonwealth v. Ferris*, 305 Mass. 233, 25 N.E. 2d 378; *Ritholz v. Commonwealth*, 184 Va. 339, 35 S.E. 2d 210; *Seifert v. Buhl Optical Company*, 276 Mich.

692, 268 N.W. 784; *State v. Rones*, 223 Ia. 839, 67 So. 2d 99 and *Bedno v. Fast*, 6 Wis. 2d 471, 95 N.W. 2d 396.

Article I, Section 8 of the Constitution of the United States delegates to Congress the authority to regulate interstate commerce. And it is settled that newspapers and radio stations are instrumentalities of interstate commerce within the meaning of that provision. It is nevertheless established that the states are not wholly precluded from exercising their police power in matters of local concern even though they may thereby indirectly affect interstate commerce. *Kroeger v. Stahl*, (CCA, 3rd Cir.), 248 F. 2d 121; *Huron Portland Cement Company v. City of Detroit*, 362 U.S. 440, 80 S. Ct. 813; *Simpson v. Shepard*, 230 U.S. 352, 33 S. Ct. 729, 57 L. Ed. 1511, and *Florida Lime and Avocado Growers, Inc. v. Paul*, (DC, N.D. Cal.) 197 F. Supp. 780. This police power extends to the right of the state to regulate trade and callings concerning public health. *Polhemus v. American Medical Association*, (CCA 10th Cir.), 145 F. 2d 357.

It is clear that state action affecting interstate commerce is precluded in three types of situations: (1) where state action directly burdens interstate commerce; (2) where state action conflicts with federal regulations; and (3) where Congress has evidenced an intent to completely preempt the area of regulation involved. *Western Live Stock v. Bureau of Revenue*, 41 N.M. 141, 65 P 2d 863; *Kelly v. State of Washington*, 302 U.S. 1, 58 S.Ct. 87, 82 L. Ed. 3; *Central Illinois Pub. Serv. Co. v. Illinois Commerce Commission*, 18 Ill. 2d 506, 165 N.E. 2d 322; and *Pennsylvania R. Co. v. Department of Public Utility Com'rs.*, 14 N.J. 411, 102 A.2d 618.

[fol. 131] The issues presented in this case, therefore, are: (1) Has the prohibition in Section 67-7-13(m), supra, against price-advertising in New Mexico in the field of optometry, as a valid exercise of the police power of the state, been superseded by federal legislation relating to advertising in interstate commerce with which it is in conflict, and (2) if Congress has not pre-empted the field of interstate advertising in the optometric field, does the enjoining of appellants from accepting and disseminating

price-advertising in New Mexico from a non-resident obstruct or directly interfere with interstate commerce?

With respect to (1) above, the Federal Trade Commission Act, Title 15, Section 52, U.S.C.A., prohibits the dissemination, or causing to be disseminated, of any *false* advertising in interstate commerce, either directly or indirectly to induce, or which is likely to induce, the purchase of foods, drugs, devices or cosmetics. In holding that this is not a pre-emption by Congress of the entire field of advertising in interstate commerce so as to preclude this state from exercising its police power for a matter of local health protection, we adopt the holding in *Bedno v. Fast*, supra, wherein the court in dealing with this same question, at least insofar as newspaper advertising is concerned, said:

"... A reading of the statute (15 U.S.C.A. Sec. 52) will show that it prohibits only *false* advertising as an unfair or deceptive act in commerce. Congress has not seen fit to include within the scope of federal legislation the dissemination of truthful advertising. Thus, the federal act does not cover the subject matter of Sec. 153.10 Stats. (Wisconsin statute similar to that of New Mexico) and does not by pre-emption preclude the state from so exercising its police power. ..."

With respect to radio broadcasting, Congress has occupied [fol. 132] the field by virtue of the Federal Communications Act of 1934. *Regents of New Mexico v. Albuquerque Broadcasting Company*, (CAA 10th Cir.), 158 F. 2d 900. The express underlying purpose of this Act is to protect the public interest in interstate communication. Section 303 of Title 47, U.S.C.A. gives the Commission authority to suspend the license of any operator who transmits communications containing profane or obscene words, language, or meaning, or false or deceptive signals or communications. Section 1464, Title 18, U.S.C.A. provides for the fining and imprisonment of any person who utters any indecent, obscene or profane language by means of radio communication. These are the federal provisions with which the Pennsylvania statute was in conflict in the

case of *Allen B. Dumont Laboratories v. Carroll*, (CCA Pa.), 184 F. 2d 153 cited by appellants. We find no such conflict in the case before us. The Federal Communications Act does not attempt to regulate truthful advertising by radio in interstate commerce.

In *Kelly v. State of Washington*, 302 U.S. 1, 58 S. Ct. 87, 82 L. Ed. 3, the court stated:

"... The principal is thoroughly established that the exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only wherein the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'"

The intention to supersede the exercise by the state of its police powers as to matters not covered by federal legislation is not to be implied unless the Act of Congress, fairly interpreted, is in conflict with the law of the state. In other words, the intention of Congress to regulate exclusively under the commerce clause will not be implied unless the federal measure is plainly inconsistent with state regulation of the same subject. *Savage v. Jones*, 225 U.S. [fol. 133] 501, 56 L. Ed. 1182; *Atlantic Coast Line Railroad Company v. Georgia*, 234 U.S. 280, 58 L. Ed. 1312; *Carey v. South Dakota*, 250 U.S. 118, 63 L. Ed. 886; *Atchison, Topeka & Santa Fe Railway Company v. Railroad Commission of California*, 283 U.S. 380, 75 L. Ed. 1128; *Mintz v. Baldwin*, 289 U.S. 346, 77 L. Ed. 1245.

Congress, in enacting legislation within its constitutional authority over interstate commerce, will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless its purpose to do so is clearly manifested, or unless the state law, in terms or in its practical administration, conflicts with the Act of Congress, or plainly and palpably infringes its policy. *Southern Pacific Company v. Arizona*, 325 U.S. 761, 65 S. Ct. 1515, 89 L. Ed. 1915; *Aladdin Industries, Inc. v. Associated Transport, Inc.*, 42 Tenn. App. 52, 298 S.W. 2d 770.

Finding no pre-emption by Congress of the entire field of advertising in interstate commerce, and no conflict between federal legislation relating to false advertising, or to false or deceptive communications and our statute seeking to regulate truthful advertising as a health and welfare measure, we must determine whether Section 67-7-13 constitutes an obstruction on or direct interference with interstate commerce in violation of the federal constitution as contended by appellants.

As we construe Section 67-7-13, it contains no restrictions directed toward the regulation of interstate commerce. It does not prohibit the publication and circulation of appellants' newspaper in interstate commerce. It does not prohibit or exclude the news media in this state from accepting advertising from citizens of other states for publication here and circulation in interstate commerce. It does not prohibit the advertising of optometric goods either [fol. 134] in this state or in interstate commerce. It merely places a restriction, in the exercise of its police power, on the manner in which advertising in the field of optometry can be done within this state alone by "any person" and "by any means." Enjoining appellants from accepting and disseminating price-advertising by their news media in New Mexico for the benefit of a local business in Gaines County, Texas, does not affect the free flow of interstate commerce with respect to proper subjects of that commerce, or contracts for the dissemination of national or foreign news and information regarding proper subjects of commerce, as defined in the cases cited by appellants. We are in agreement with the line of reasoning expressed in *State v. J. P. Bass Publishing Company*, 104 Me. 288, 71 A. 894, a state in which the sale or keeping for sale of intoxicating liquor was illegal, which involved a valid exercise of the police power prohibiting the advertising within the state of liquor sold or kept for sale without the state. The court said:

"... If the state cannot wholly prevent the mischief of such advertisements by excluding from the state all newspapers containing them wherever published, it may yet prevent such increase and spread of the mis-

chief as would result from such advertisements being printed in newspapers published within ~~its own~~ the state ~~territory~~. It may to that extent control the conduct of printers and publishers within its own territory. . . ."

Having determined that Section 67-7-13(m) does not constitute an obstruction on interstate commerce, we come to appellants' second contention that the statute is an unreasonable infringement of personal property rights and an unwarranted oppressive interference with their liberty of contract in violation of the Constitutions of the United States and of New Mexico. In support thereof, appellants [fol. 135] rely on the case of *Little v. Smith*, 124 Kan. 237, 257 Pac. 959 in which a statute prohibited the advertising of items legally for sale within the state. It seems clear to this court that the case is not in point since we are not dealing here with the prohibition of advertising but a reasonable police regulation of the manner in which the advertising can be done in this state. Appellants quote from *Little v. Smith*, as follows:

" . . . A statute restraining the liberties and property rights of citizens cannot be upheld unless it has real relation to its object and the regulation reasonably adapted to accomplish the end sought to be attained. . . ."

The court in that case found the absolute prohibition to be discriminatory, but we think there can be no question but that the valid exercise of the police power in this case has a real relation to the objects sought to be attained. As has been held by this Court in *Green v. Town of Gallup*, 46 N.M. 71, 120 P. 2d 619, and *Mitchell v. City of Roswell*, 45 N.M. 92, 111 P. 2d 41, property and property rights are held subject to the fair exercise of the police power and a reasonable regulation, enacted for the benefit of public health, convenience, safety or general welfare is not unconstitutional "taking of property" in violation of the contract clause, "due process" clause or "equal protection" clause of the Federal Constitution. Nor would it violate

any constitutional rights guaranteed by the Constitution of New Mexico. See *Klein v. Department of Registration and Education*, 412 Ill. 75, 105 N.E. 2d 758.

We conclude as did the trial court, enjoining the appellants from aiding and abetting a non-resident in the violation [fol. 136] of a law of New Mexico is as essential to the administration of the provisions of our statutes relating to the practice of optometry for the health and welfare of our citizens as would be the prosecution of a resident optometrist for the same offense.

The judgment should be affirmed. It Is So Ordered.

J. C. Compton, Chief Justice.

We Concur: David W. Carmody, David Chavez, Jr., M. E. Noble, JJ.

Moise, J., not participating.

[fol. 137]

IN THE SUPREME COURT OF NEW MEXICO

LEA COUNTY

Wednesday, April 11, 1962

No. 7001

NEW MEXICO BOARD OF EXAMINERS IN OPTOMETRY,
Plaintiff-Appellee,

vs.

ABNER ROBERTS; AGNES K. HEAD, d/b/a LEA COUNTY
PUBLISHING Co.; PERMIAN BASIN RADIO CORPORATION;
and KWEW, Inc., Defendants-Appellants.

JUDGMENT—April 11, 1962

This cause having heretofore been argued, submitted and taken under advisement, and the Court being now suffi-

ciently advised in the premises announces its decision by Chief Justice Compton, Mr. Justice Carmody, Mr. Justice Chavez and Mr. Justice Noble concurring, Mr. Justice Moise not participating, affirming the judgment of the District Court for the reasons given in the opinion of the Court on file;

Now, Therefore, It Is Considered, Ordered and Adjudged by the Court that the judgment of the District Court within and for the County of Lea, whence this cause came into this Court, be and the same is hereby affirmed, and the cause is remanded to the said District Court of Lea County for such further proceedings therein as may be proper, if any, consistent and in conformity with said opinion and this judgment.

[fol. 138]

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

MANDATE—May 3, 1962

The State of New Mexico To The District Court, sitting within and for the County of Lea, Greeting:

Whereas, in a certain cause lately pending before you, numbered 18794 on your Civil Docket, wherein New Mexico Board of Examiners in Optometry was Plaintiff, and Abner Roberts, Agnes K. Head, d/b/a Lea County Publishing Co., Permian Basin Radio Corporation and KWEW, Inc., were Defendants, by your consideration in that behalf judgment was entered against said Defendants; and

Whereas, said cause and judgment were afterwards brought into our Supreme Court for review by Defendants by appeal, whereupon such proceedings were had that on April 11, 1962, an opinion was handed down and the judgment of said Supreme Court was entered affirming your judgment aforesaid, and remanding said cause to you;

Now, Therefore, this cause is hereby remanded to you for such further proceedings therein as may be proper, if any, consistent and in conformity with said opinion and the judgment of this Court.

law, or as a denial to them of equal protection of the laws.

Carol J. Head, 11 Broadway, New York 4, New York,
Attorney for Agnes K. Head, d b a Lea County
Publishing Co., and Permian Basin Radio Cor-
poration.

[fol. 143] Affidavit of Service (omitted in printing).

[fol. 144] Clerk's Certificate to foregoing transcript
(omitted in printing).

[fol. 145]

SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—November 13, 1962

Appeal from the Supreme Court of the State of New
Mexico.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. In addition to the questions listed in the jurisdictional statement, the parties are requested to address themselves to the issue of possible federal preemption by reason of the Federal Communications Act. The Solicitor General is also invited to express the views of the Federal Communications Commission on this issue.

November 13, 1962

Witness, The Honorable J. C. Compton, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 3rd day of May, 1962.

Lowell C. Green, Clerk of the Supreme Court of the State of New Mexico.

[fol. 139]

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

[Title omitted]

RECEIPT FOR MANDATE—May 4, 1962

Received of Lowell C. Green, Clerk of the Supreme Court, mandate of said Court directed to the District Court of Lea County, issued on 3rd day May, 1962, in the above entitled cause.

W. M. Beauchamp, Clerk of District Court, Lea County.

Dated at Lovington, New Mexico, May 4, 1962.

[fol. 140]

[File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 7001

AGNES K. HEAD, d/b/a/LEA COUNTY PUBLISHING CO., and
PERMIAN BASIN RADIO CORPORATION, Appellants,

v.

NEW MEXICO BOARD OF EXAMINERS IN OPTOMETRY, Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES—Filed July 6, 1962

I. Notice is hereby given that Agnes K. Head, d/b/a Lea County Publishing Co., and Permian Basin Radio Corpora-

tion, the appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Mexico affirming the judgment of the District Court of Lea County, State of New Mexico, by which appellants were enjoined from accepting or publishing within the State of New Mexico advertising of any nature from Abner Roberts which quotes prices or terms on eye glasses, spectacles, lenses, frames or mountings, or which quotes discounts to be offered on same, or which quotes moderate prices, or words of similar import, as prohibited by the provisions of Section 67-7-13, New Mexico Statutes Annotated; 1953, entered in this action on April 11, 1962.

This appeal is taken pursuant to 28 U.S.C.A. Section 1257(2).

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

[fol.141] a. In the District Court of Lea County, State of New Mexico:

- (1) All pleadings;
- (2) All requested findings of fact and conclusions of law;
- (3) All stipulations, exhibits and oral evidence introduced in the trial in the District Court;
- (4) Reporter's transcript of all proceedings not filed of record;
- (5) All orders, judgments, decrees and decisions of the District Court;
- (6) Motion and order granting appeal to the Supreme Court of the State of New Mexico; and
- (7) Notice of Appeal to the Supreme Court of the State of New Mexico.

b. In the Supreme Court of the State of New Mexico:

- (1) Appellants' Brief in Chief;

- (2) Appellee's Answer Brief;
- (3) Appellants' Reply Brief;
- (4) Opinion of the Supreme Court of the State of New Mexico; and
- (5) Reporter's transcript of all proceedings not filed of record.

c. Any other papers, instruments, pleadings, orders, opinions and matters of record in this action in the District Court of Lea County, State of New Mexico, or in the Supreme Court of the State of New Mexico.

III. The following questions are presented by this appeal:

Whether Section 67-7-13 of New Mexico Statutes Annotated, 1953, as applied to appellants, residents of New Mexico [fol. 142] who in New Mexico are engaged in interstate commerce through the publishing of a newspaper and the operation of a television station, respectively, having circulation and broadcast coverage in both New Mexico and States other than New Mexico, in prohibiting, and the action of the New Mexico courts thereunder in enjoining, appellants from publishing and disseminating in the State of New Mexico certain commercial advertising of eye glasses, lenses and frames and services relating thereto by a resident of the State of Texas practising optometry and offering such advertised articles and services for sale only in the State of Texas, is:

- (1) unconstitutional as an undue and unreasonable burden on interstate commerce under the "Commerce Clause" of the United States Constitution, Article I, Section 8, clause 3.
- (2) unconstitutional under Section 1 of the Fourteenth Amendment to the United States Constitution, either as an abridgment of their privileges [sic] and immunities as citizens of the United States, or as a deprivation of their property without due process of

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. **392**

AGNES K. HEAD, d/b/a LEA COUNTY PUBLISHING
CO., and PERMIAN BASIN RADIO CORPORATION,

Appellants,

against

NEW MEXICO BOARD OF EXAMINERS
IN OPTOMETRY,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW MEXICO

CAROL J. HEAD
Eleven Broadway,
New York 4, New York
Counsel for Appellants

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1962

No.

**AGNES K. HEAD, d/b/a LEA COUNTY PUBLISHING CO., AND
PERMIAN BASIN RADIO CORPORATION,**

Appellants,

against

NEW MEXICO BOARD OF EXAMINERS IN OPTOMETRY,

Appellee.

**ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW MEXICO**

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of the State of New Mexico, entered on April 11, 1962, affirming the judgment of the District Court of Lea County, State of New Mexico, and submit this Jurisdictional Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial federal questions are presented.

OPINION BELOW

The Opinion of the Supreme Court of the State of New Mexico is reported at 70 N.M. 90, 370 P. 2d 811, and is also set forth in the record (R. 126-136). A copy of that opinion

is attached hereto as Appendix A. The order of the New Mexico Supreme Court affirming the judgment of the District Court of Lea County, State of New Mexico, is also set forth in the record (R. 137), and a copy of that order is attached hereto as Appendix B. No opinion has been filed by the New Mexico District Court. The District Court's oral ruling upon the trial of the case is set forth in the record (R. 45-47), as are its decision (findings of fact and conclusions of law) (R. 28-31) and its final decree (R. 32-33). Copies of such oral ruling, findings of fact and conclusions of law and final decree are attached hereto as Appendix C.

JURISDICTION

This suit was brought in the New Mexico District Court to enjoin appellants from accepting and publishing certain advertising from Abner Roberts under Section 67-7-13, New Mexico Statutes Annotated, 1953 Compilation (hereinafter cited as "N.M.S.A., 1953"). The text of Section 67-7-13 is attached hereto as Appendix D. The judgment of the Supreme Court of New Mexico (Appendix B) was entered on April 11, 1962, and notice of appeal by appellants (R. 140-142) was filed in that court on July 6, 1962. The jurisdiction of this Court of this appeal is invoked under 28 U.S.C. §1257(2). The following decisions sustain the jurisdiction of this Court to review the judgment on appeal in this case: *Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282; *Greyhound Lines v. Mealey*, 334 U. S. 653; *Marcus v. Search Warrant*, 367 U. S. 717.

QUESTIONS PRESENTED

Whether Section 67-7-13 of N.M.S.A. 1953, as applied to appellants, residents of New Mexico who in New Mexico are engaged in interstate commerce through the publishing of a newspaper and the operation of a radio (inadvertently stated as television in the notice of appeal) station, respec-

tively, having circulation and broadcast coverage in both New Mexico and States other than New Mexico, in prohibiting, and the action of the New Mexico Courts thereunder in enjoining, appellants from publishing and disseminating in the State of New Mexico certain commercial advertising of eye glasses, lenses and frames and services relating thereto by a resident of the State of Texas practicing optometry and offering such advertised articles and services for sale only in the State of Texas, is:

- (1) unconstitutional as an undue and unreasonable burden on interstate commerce under the "Commerce Clause" of the United States Constitution, Article I, Section 8, clause 3.
- (2) unconstitutional under Section 1 of the Fourteenth Amendment to the United States Constitution, either as an abridgment of their privileges and immunities as citizens of the United States, or as a deprivation of their property without due process of law, or as a denial to them of equal protection of the laws.

STATUTES INVOLVED

Article I, Section 8, clause 3 of the United States Constitution provides as follows:

"Section 8. The Congress shall have Power***

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

Section 1 of the Fourteenth Amendment to the United States Constitution provides as follows:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 67-7-13 of N.M.S.A., 1953 is set forth in Appendix D hereto. Subsection 67-7-13 (m) thereof provides as follows:

"67-7-13. Offenses-Penalties.—Each of the following acts on the part of any person shall constitute a misdemeanor and shall be punished by a fine of not less than \$50.00 nor more than \$200.00 or imprisonment in the county jail for not less than 30 days nor more than six (6) months, or both such fine and imprisonment for the first offense, and for a second offense a fine of not less than \$200.00 nor more than \$500.00, or imprisonment in the county jail for not less than 90 days nor more than one (1) year, or both such fine and imprisonment. All fines thus received shall be paid into the common school fund of the county in which such conviction takes place.

.

(m) Advertising by any means whatsoever the quotation of any prices or terms on eyeglasses, spectacles, lenses, frames or mountings, or which quotes discount to be offered on eyeglasses, spectacles, lenses, frames or mountings or which quotes 'moderate prices,' 'low prices,' 'lowest prices,' 'guaranteed glasses,' 'satisfaction guaranteed,' or words of similar import."

STATEMENT OF THE CASE

Appellant Agnes K. Head (hereinafter called "Head") is a resident of Hobbs, Lea County, New Mexico, where she does business as Lea County Publishing Company, publishing a newspaper called the "Hobbs Flare". In addition to its circulation in New Mexico this newspaper has circulation in thirteen states and the District of Columbia, including circulation in some twenty-seven communities in

the State of Texas. Appellant Permian Basin Radio Corporation (hereinafter called "Permian"), a corporation, owns and operates in Hobbs, Lea County, New Mexico, Radio Station K-HOB, having broadcast coverage in New Mexico and Texas. It receives news coverage from certain cities in Texas and handles advertising from national advertising concerns and for firms and merchants situated in Texas (R. 28-29, 44-45, 48-53).

Appellee is an agency of the State of New Mexico and is charged with the administration of New Mexico's laws (Sections 67-7-1 through 67-7-14, N.M.S.A., 1953) relating to the practice of optometry (R. 28-29).

In September 1960, appellee commenced an action in the District Court of Lea County, New Mexico against Appellants Head and Permian and also Abner Roberts (hereinafter called "Roberts") and KWEW, Inc. (hereinafter called "KWEW"), seeking to enjoin Appellants Head and Permian and KWEW, which operates in Hobbs, Lea County, New Mexico, Radio Station KWEW, from accepting and publishing in New Mexico certain advertising by Roberts, an optometrist residing and practicing optometry in Gaines County, Texas, just across the Texas-New Mexico border and a few miles east of Hobbs, which quoted prices or discounts on eyeglasses in alleged violation of Section 67-7-13, N.M.S.A., 1953 (R. 1-7; 28-29). Roberts, who is also licensed to practice optometry in New Mexico, but now resides and practices in Texas, did not appear, although he was apparently served with process in Texas (R. 15), and on January 4, 1961 the District Court entered a decree enjoining him from price advertising eyeglasses in New Mexico. A copy of this decree, which was served on Roberts in Texas on January 20, 1961 (R. 20), is set forth in the record (R. 15-16) and is attached hereto as Appendix C.

Appellants Head and Permian and KWEW appeared in the action and in their answers they raised, among others,

the defenses that enforcement of Section 67-7-13, N.M.S.A., 1953 against them as sought by appellee would deny them equal protection of the laws and deprive them of their property without due process of law in violation of the Fourteenth Amendment to the United States Constitution and would constitute an undue burden on and discrimination against interstate commerce (R. 8-9; 13-14; 18-19). By requested conclusions of law these defenses were again asserted (R. 22-23).

Following appellee's motion for summary judgment, the matter was heard by the District Court on January 19, 1961, the evidence presented consisting of certain stipulations, including stipulations that appellants Head and Permian and KWEW had accepted price advertising from Roberts and would continue to do so unless enjoined by the court. In announcing its ruling that an injunction would issue as prayed, the District Court stated that Roberts was a non-resident of New Mexico and beyond the jurisdiction of that Court, that his activities could not be controlled by the Court, and that Texas had no such act as appellee sought to enforce. However, the District Court further stated that Roberts' acts were illegal and that the other defendants were engaged in a conspiracy to assist him and should be restrained (R. 45-47, Appendix C).

In its decision the District Court specifically reached conclusions of law that the enforcement of Section 67-7-13 and the enjoining of appellants as done, did not offend the Constitution of the United States. (R. 30, Appendix C). Accordingly, on April 7, 1961 the District Court filed its final decree perpetually enjoining and restraining appellants Head and Permian and KWEW "from accepting or publishing within the State of New Mexico advertising of any nature from Abner Roberts which quotes prices or terms on eye glasses. . . ." (R. 32-33, Appendix C).

Appellants Head and Permian and KWEW appealed the decision of the District Court to the New Mexico Supreme Court (R. 34-37), raising before that Court the same defenses under the United States Constitution as had been raised below (R. 62-78, 108-123). Roberts, not having appeared, did not appeal. The New Mexico Supreme Court, after written briefs and oral argument were presented, affirmed the District Court on April 11, 1962.

In its written opinion (R. 126-136, Appendix A), the New Mexico Supreme Court considered appellants' defenses under the United States Constitution at length and rejected each of them. The Court concluded that Congress had not preempted the entire field of advertising in interstate commerce and that there was no conflict between federal legislation relating to false advertising and Section 67-7-13. It further construed that section as containing no restriction directed toward the regulation of interstate commerce, stating that "it merely places a restriction, in the exercise of its police power, on the manner in which advertising in the field of optometry can be done within this state alone by 'any person' and 'by any means.'" The Court reasoned as follows:

.... Enjoining appellants from accepting and disseminating price-advertising by their news media in New Mexico for the benefit of a local business in Gaines County, Texas, does not affect the free flow of interstate commerce with respect to proper subjects of that commerce, or contracts for the dissemination of national or foreign news and information regarding proper subjects of commerce, as defined in the cases cited by appellants. We are in agreement with the line of reasoning expressed in *State v. J. P. Bass Publishing Company*, 104 Me. 288, 71 A. 894, a state in which the sale or keeping for sale of intoxicating liquor was illegal, which involved a valid exercise of the police power prohibiting the advertising within the state of liquor sold or kept for sale without the state. The court said:

... If the state cannot wholly prevent the mischief of such advertisements by excluding from the state all newspapers containing them wherever published, it may yet prevent such increase and spread of the mischief as would result from such advertisements being printed in newspapers published within the state territory. It may to that extent control the conduct of printers and publishers within its own territory. . . ."

The New Mexico Supreme Court further held that the statutory regulation in question did not violate the "contract clause", "due process clause" or "equal protection" clause of the United States Constitution, and concluded that "enjoining the appellants from aiding and abetting a non-resident in the violation of a law of New Mexico is as essential to the administration of the provisions of our statutes relating to the practice of optometry for the health and welfare of our citizens as would be the prosecution of a resident optometrist for the same offense."

Appellants Head and Permian filed their notice of appeal of that decision to this Court with the Clerk of the Supreme Court of New Mexico on July 6, 1962 (R. 140-142). KWEW has apparently not appealed that decision.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The issues involved in this appeal have not heretofore been decided by this Court. In the few instances in which similar issues have been considered by lower federal or state courts, the decisions have been conflicting and they have been rendered with respect to distinguishable circumstances. These issues are of substantial importance not only to publishers and broadcasters, but to all the many persons who have occasion to advertise their services or wares or other matters in newspapers, magazines and other publications having multistate circulation or by radio or

television broadcasts having multistate coverage. They are of substantial importance not only to appellants or residents of New Mexico and Texas, but to others similarly situated in all states.

In this case the State of New Mexico has perpetually enjoined appellants from accepting and publishing in New Mexico, from where they normally publish and broadcast, price advertising of eyeglasses by Abner Roberts even though Roberts resides and practices optometry in Texas, appellants' newspaper and radio station have circulation and broadcast coverage in Texas, and Texas does not impose like restrictions on advertising by optometrists. By virtue of §67-7-13 N.M.S.A., 1953, New Mexico, through its legislature and courts, would compel appellants to maintain places of business not only in New Mexico but in Texas in order to disseminate advertising by an optometrist residing and practicing in Texas.

The fact that New Mexico has several other statutes purporting to restrict the right to advertise or placing conditions thereon emphasizes the importance of this case. Thus, New Mexico statutes (N.M.S.A., 1953) provide variously that it is unlawful for any person engaged in any business or profession to advertise that sales tax is not included in the price of the thing advertised (§72-16-7); that any person who may advertise second hand watches shall state that they are second hand (§40-21-30); that it is unlawful for any merchant to advertise any item of merchandise with a limitation upon the number of such items which any purchaser may buy at the advertised price (§45-1-5); and that no owner or keeper of a stallion not of pure breeding shall permit the printing of any newspaper or other advertisement calling attention to the stallion as a breed unless the advertisement has the words "grade" or "scrub" before the word "stallion" in one inch type (§47-11-14).

Texas has no identical statutes, although it does have several statutes of its own restricting advertisements. This fact emphasizes the importance of the issue of whether one state can lawfully restrict advertising with advertising media normally engaged in serving not only that state but other states whose laws may be different and into which residents of the former may travel for commercial purposes. If New Mexico can validly restrict appellants' publishing and broadcasting of price advertisements on eyeglasses, then it surely can as easily restrict their dissemination of advertising placed by non-residents but within the literal proscriptions of the foregoing statutes. If every state could thus restrict advertising by non-residents with media having interstate circulation or coverage, the disruption to interstate commerce would be great and far reaching.

The wisdom of the New Mexico statute regulating the practice of optometry is not here in question, for in *Williamson v. Lee Optical Co.*, 348 U. S. 483, this Court upheld an Oklahoma statute regulating the practice of optometry and restricting advertising by optometrists. There are significant differences between that case and appellants' case. The Oklahoma statute restricted only advertising by opticians and had a specific proviso to the effect that the Act should not render any newspaper or other advertising media liable for publishing any advertising furnished them by a vendor (348 U. S. 483, 488, n 2). Moreover, the complaining parties were Oklahoma residents complaining about the effect of the statute in Oklahoma and no issue of interstate commerce was involved or considered.

But there is a fundamental issue of interstate commerce involved in appellants' case. Appellants are engaged in interstate commerce and the very advertising they have been enjoined from disseminating is a part of that commerce. *Lorain Journal v. U. S.*, 342 U. S. 143; *Farmer's Guide Co. v. Prairie Co.*, 293 U. S. 268; *Fisher's Blend*

Station v. Tax Commission, 297 U. S. 650; *Allen B. Dumont Laboratories v. Carroll*, 184 F. 2d 153, C.A. 3rd Cir., Cert. Den. 340 U. S. 929.

The clear effect of the statute in question and the action of the New Mexico courts in enjoining appellants thereunder is the burdening of interstate commerce. This burden is as undue and unreasonable as it is real, and should not stand.

In holding that no undue burden on interstate commerce was here involved, the New Mexico Supreme Court stated that it was in agreement with the line of reasoning expressed in *State v. J. P. Bass Publishing Company*, 104 Me. 288, 71 A. 894. In that case the Supreme Court of Maine upheld the defendant's conviction for publishing in Maine an advertisement for the sale of intoxicating liquor placed by a firm in Massachusetts. In Maine the sale and advertising for sale of liquor was illegal, whereas in Massachusetts it was legal. Rejecting a defense based on the commerce clause of the United States Constitution, Article I, Section 8, Clause 3, the Court affirmed the conviction on the basis of *Delamater v. South Dakota*, 205 U.S. 93. It considered that even if it could not prevent an out of State newspaper advertising liquor from coming into Maine, it could prevent such advertising by those within its own territory.

Intoxicating liquor historically has been treated as a special category as regards the right of the states to regulate its flow in interstate commerce. This distinction was noted by this Court in *Delamater v. South Dakota*, *supra*, where the Court stated that as the matter involved liquor, South Dakota's conviction of Delamater for soliciting liquor sales in South Dakota without a license did not require the Court to determine whether the restraints of the South Dakota statute would be a direct burden on interstate commerce if generally applied to subjects of commerce (205

U.S. 93, 97). Cases involving interstate commerce in liquor are not controlling authority as to other subjects of commerce, *Carter v. Virginia*, 321 U.S. 131; *State v. Salt Lake Tribune Pub. Co.*, 68 Utah 87, 249 Pac. 479, and the reliance of the New Mexico Supreme Court thereon is misplaced.

More in point is the *Salt Lake Tribune* case, *supra*. In that case the respondent published in Utah a newspaper having circulation in other states. The Supreme Court of Utah reversed the respondent's conviction for having published an advertisement for cigarettes in violation of a statute prohibiting such advertisement but allowing the sale of cigarettes upon proper licensing. The court held that the statute as applied constituted an undue interference with interstate commerce. In so holding the court distinguished *State v. J. P. Bass Publishing Company*, 104 Me. 288, 71 A. 894 because that decision was concerned with advertisements of liquor, which was not within the protection of the commerce clause, and relied instead on *Post Printing & Publishing Co. v. Brewster*, 246 Fed. 321 (D. Kan.).

In the latter case the United States District Court for Kansas held that a newspaper publisher who published in Missouri but circulated its papers in Kansas, could not be prohibited by Kansas from selling in Kansas papers containing cigarette advertisements. The advertising of cigarettes was lawful in Missouri but not in Kansas.

The foregoing *Bass*, *Salt Lake Tribune* and *Post Printing* cases are the only cases in which the issues of interstate commerce similar to those involved in appellants' case have been meaningfully considered. Compare *Little v. Smith*, 124 Kan. 237, 257 Pac. 959; *State v. Packer Corp.*, 77 Utah 500, 297 Pac. 1013, aff'd, 285 U.S. 105. Not only do these cases split on the question of prohibiting advertising in interstate commerce, but they raise a fundamental subsidiary question as to whether a state may not prohibit the circulation of a

newspaper printed outside the state and carrying certain advertising, but may nevertheless prohibit the circulation of a newspaper printed within the state carrying identical advertising. Clarification of both of these issues by this Court is both desirable and needed.

By preventing appellants from carrying advertising by Roberts, New Mexico, has curbed Roberts' advertising not only in New Mexico, but in Texas and other states. In effect, therefore, by this action New Mexico has denied to the residents of Texas and other states information as to the prices of Roberts' eyeglasses. That New Mexico may consider that the welfare of its residents demands that such information be denied them cannot entitle it to impose its policy on Texas or any other state. In *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, this Court held that New York could not, as a condition to licensing him to sell milk in New York, compel a person to pay a minimum price set by New York for milk purchased in Vermont. The Court stated that the price to be paid producers in Vermont was Vermont's concern, not New York's, and that such a regulation was an undue burden on interstate commerce. What the Court there said as to the purpose of the commerce clause is pertinent here:

"Imposts and duties upon interstate commerce are placed beyond the power of a state, without the mention of an exception, by the provision committing commerce of that order to the power of the Congress. Constitution, Art. I, § 8, clause 3. It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business." *International Textbook Co. v. Pigg.*, 217 U.S. 91, 112; and see *Brennan v. Titusville*, 153 U.S. 289; *Brown v. Houston*, 114 U.S. 622; *Webber v. Virginia*, 103 U.S. 344, 351; *Kansas City Southern Ry. Co. v. Kaw Valley Drainage District*, 233 U.S. 75, 79. Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when

the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the Hypothesis. We are reminded in the opinion below that a chief occasion of the commerce clauses was 'the mutual jealousies and aggressions of the States, taking form in custom barriers and other economic retaliation.' Farrand, *Records of the Federal Convention*, vol. II, p. 308; vol. III, pp. 478, 547, 548; *The Federalist*, No. XLII; Curtis, *History of the Constitution*, vol. 1, p. 502; Story on the Constitution, §259. If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation." 294 U.S. 511, 522.

No less than in the *Seelig* case does the action of New Mexico here in question offend the commerce clause and unduly burden interstate commerce. No less there than here is the door opened to rivalries and reprisals meant to be averted by the commerce clause.

Further, in advertising with appellants Roberts reaches not only residents of Texas and other states but residents of New Mexico. Whatever may be the right of New Mexico to limit its residents' activities in New Mexico, it cannot limit their lawful activities in other states. As citizens of the United States, they have the clear and unobstructible right to purchase in Texas eyeglasses from Roberts. *Allgeyer v. Louisiana*, 165 U.S. 578; *St. Louis Compress Co. v. Arkansas*, 260 U.S. 346. New Mexico, therefore, clearly could not prevent its residents from traveling between New Mexico and Texas for the lawful purpose of purchasing eyeglasses from Roberts. *Edwards v. California*, 314 U.S. 160. Yet, the effect of its action is the same. By foreclosing from its residents advertising information as to articles legitimately for sale in Texas, New Mexico just as effec-

tively prevents its residents from traveling to Texas for that purpose as if they were physically restrained. This too unduly burdens interstate commerce and appellants are among the victims of that burden.

In addition, appellant Permian is a radio station licensed by the Federal Communications Commission. By the Communications Act of 1934, 47 U.S.C. §151 et seq., Congress has occupied the field of regulation of radio broadcasting in its entirety. *Scripps-Howard Radio v. Commn.*, 316 U.S. 4; *Allen B. Dumont Laboratories v. Carroll*, 184 F. 2d 153, C.A. 3rd Cir., cert. den. 340 U.S. 929. Appellant Permian, enjoined from carrying advertising, has been censored no less than Dumont in the *Dumont* case, where the court held that Pennsylvania's attempts to censor films shown on television were foreclosed by federal preemption.

In regulating what advertising a radio station may engage in, New Mexico has entered an area reserved for federal regulation, and its incursion should not stand. Compare *Farmers Union v. WDAY*, 360 U. S. 525.

It is significant that the District Court in the *Dumont* case stated that it considered Pennsylvania's efforts to censor films shown on television an undue and unreasonable burden on interstate commerce. 86 F. Supp. 813, 816.

The action of the New Mexico courts in enjoining appellants from disseminating price advertising by Roberts is more than an undue burden on interstate commerce. As to appellant Head, an individual, it violates her privileges and immunities as a United States citizen as protected by the Fourteenth Amendment. As was stated in *Crutcher v. Kentucky*, 141 U. S. 47, 57, "To carry on interstate commerce is not a franchise or privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States." Yet, although no reasonable basis exists

for denying her privilege of engaging in interstate commerce in carrying price advertising of a Texas optometrist, appellant Head may now engage in such commerce only under the cloud of being found in contempt of the New Mexico District Court by which she was enjoined. Compare *Lovell v. Griffin*, 303 U. S. 444; *Grosjean v. American Press Co.*, 297 U. S. 233.

Moreover, New Mexico has not sought to enjoin publishers of newspapers and operations of radio stations who publish and broadcast in Texas and whose circulation and broadcast coverage include New Mexico from disseminating Roberts' price advertising. In singling out appellants for application of Section 67-7-13 N.M.S.A., 1953, New Mexico has denied to appellants equal protection of the laws under the Fourteenth Amendment to the Constitution. *Little v. Smith*, 124 Kan. 237, 257 Pac. 959. Compare *State v. Parker Corp.*, 77 Utah 500, 297 Pac. 1013, aff'd. 285 U. S. 105.

Above all, New Mexico's statute, as here applied by its courts, deprives appellants of their property without due process of law in violation of the Fourteenth Amendment. As this Court expressed in *Nebbia v. New York*, 291 U. S. 502, 525,

"The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts."

Section 67-7-13 N.M.S.A., 1953, as here applied, does not meet this test. That New Mexico may have a legitimate interest in protecting its residents' eyesight does not justify its regulation of appellants to the extent that they are precluded from carrying in interstate commerce advertising of an optometrist resident and practicing in a neighboring state. See also *Allgeyer v. Louisiana*, 165 U. S. 578; *St. Louis Compress Co. v. Arkansas*, 260 U. S. 346.

It is submitted that the Supreme Court of New Mexico erred in affirming the decision of the district court enjoining appellants and that this appeal presents important and substantial questions of federal law relating to interstate commerce and the rights of those engaged therein which should be decided by this Court.

Respectfully submitted,

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Appendix A

IN THE
Supreme Court
of the State of New Mexico

NEW MEXICO BOARD OF EXAMINERS IN
 OPTOMETRY,

Plaintiff-Appellee.

vs.

ABNER ROBERTS; AGNES K. HEAD, d/b/a
 LEA COUNTY PUBLISHING CO.; PER-
 MIAN BASIN RADIO CORPORATION; and
 KWEW, INC.,

- Defendants-Appellants.

No. 7001
 SUPREME COURT
 OF NEW MEXICO

Filed
 Apr. 11, 1962
 Lowell C. Green,
 Clerk

**APPEAL FROM THE DISTRICT COURT
 OF LEA COUNTY**

BRAND, JUDGE

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OPINION

COMPTON, Chief Justice.

This is an appeal from a final decree perpetually enjoining and restraining defendants Agnes K. Head, d/b/a Lea County Publishing Company, publisher of the newspaper Hobbs Flare; Permian Basin Radio Corporation, owner and operator of radio Station KHOB; and KWEW, Inc., owner and operator of radio station KWEW, all of Hobbs, New Mexico, from accepting, disseminating and publishing within the State of New Mexico advertising of any nature from defendant, Abner Roberts, a resident of Texas, which quotes prices or terms on eye glasses, spectacles, lenses, frames, or mountings, or quotes discounts to be offered on same, or which quotes moderate prices, or words of similar import, as prohibited by the provisions of § 67-7-13, N.M.S.A. 1953.

The trial court found that the defendants, other than Roberts, in publishing the advertising, were aiding and abetting in and encouraging the violation of this section of the statute and that enjoining them from so doing does not offend either the Constitution of the United States or the Constitution of New Mexico.

The pertinent portions of the statute read as follows:

“67-7-13. OFFENSES-PENALTIES.—Each of the following acts on the part of any person shall constitute a misdemeanor and shall be punished by a fine of not less than \$50.00 nor more than \$200.00 or imprisonment in the county jail for not less than 30 days nor more than six (6) months, or both such fine and imprisonment for the first offense, and for a second offense a fine of not less than \$200.00 nor more than \$500.00, or imprisonment in the county jail for not less than 90 days nor more than one (1) year, or both such fine and imprisonment. All fines thus received shall be paid into the com-

mon school fund of the county in which such conviction takes place.

“(m) Advertising by any means whatsoever the quotation of any prices or terms on eye glasses, spectacles, lenses, frames or mountings or which quotes discount to be offered on eye glasses, spectacles, lenses, frames or mountings or which quotes ‘moderate prices,’ ‘low prices,’ ‘lowest prices,’ ‘guaranteed glasses,’ ‘satisfaction guaranteed,’ or words of similar import.”

Abner Roberts, a defendant below but not a party to this appeal, resides and practices optometry in Gaines County, Texas, located approximately 4 miles east of Hobbs, New Mexico, and in the trade area served by the news media of the other defendants who are the appellants here and who have their principal places of business in Hobbs, New Mexico. Roberts placed his advertisements with them by telephone.

It is conceded by appellants on this appeal that if Roberts were a resident of, or practicing optometry in, New Mexico the above statute would be applicable to and enforceable against him. But it is appellants' contention that because they are engaged in interstate commerce the statute upon which this action is based constitutes an obstruction on such commerce by restraining them from engaging in interstate commerce with a citizen of Texas lawfully practicing optometry in Texas and that, therefore, (1) the statute in question violates the provisions of Article I, Section 8, Paragraph 3 of the Constitution of the United States relating to interstate commerce; and (2) that it is an unreasonable infringement of personal property rights, an unwarranted oppressive interference with the liberty of contract and violates the Fourteenth Amendment of the Constitution of the United States and Article II, Section 18 of the Constitution of New Mexico.

It is the contention of the appellee, on the other hand, that the regulation of interstate commerce is not involved in this action since the New Mexico statute as well as the decree of the court below seek only to control conduct in New Mexico in the legitimate exercise of its police power.

In support of appellants' first contention that this statute violates the commerce clause in its application to them, appellants have cited cases which define interstate commerce and conclude that newspapers with circulation in other states, and radio stations whose programs are received in other states, are engaged in interstate commerce. We have no quarrel with the decisions in these cases insofar as they deal with the prohibition by a state of *all* advertising relating to a commodity moving in interstate commerce into its state from another state for legal sale in its original package, or with direct burdens on, or direct interference with, the publication and circulation of newspapers in interstate commerce or the privilege of doing business in interstate commerce, or with state statutes which conflict with federal legislation where Congress has fully occupied the field. But appellants have brought to our attention no authority for the proposition that persons engaged in interstate commerce are under no circumstances subject to valid legislation of the state in which they are doing business enacted in the exercise of its police power for the health and welfare of its citizens.

The Legislature of New Mexico enacted Section 67-7-13, *supra*, to protect its citizens against the evils of price-advertising methods tending to satisfy the needs of their pocketbooks rather than the remedial requirements of their eyes. That this is a valid exercise of the police power of the state is not questioned in this action and, in view of the decisions cited by appellee upholding the constitutionality of similar statutes in other states, we do not think it can be. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U. S. 483,

75 S. Ct. 461; *Ritholz v. Indiana State Board of Registration and Examination in Optometry* (USDC N.D. Ind.), 45 F. Supp. 423; *Abelson's Inc. v. New Jersey State Board of Optometrists*, 5 N. J. 412, 75 A. 2d 867; *City of Springfield v. Hurst*, 144 Ohio St. 49; 56 N. E. 2d 185; *Commonwealth v. Ferris*, 305 Mass. 233, 25 N. E. 2d 378; *Ritholz v. Commonwealth*, 184 Va. 339, 35 S. E. 2d 210; *Seifert v. Buhl Optical Company*, 276 Mich. 692, 268 N. W. 784; *State v. Rones*, 223 La. 839, 67 So. 2d 99 and *Bedno v. Fast*, 6 Wis. 2d 471, 95 N. W. 2d 396.

Article I, Section 8 of the Constitution of the United States delegates to Congress the authority to regulate interstate commerce. And it is settled that newspapers and radio stations are instrumentalities of interstate commerce within the meaning of that provision. It is nevertheless established that the states are not wholly precluded from exercising their police power in matters of local concern even though they may thereby indirectly affect interstate commerce. *Kroeger v. Stahl*, (CCA, 3rd Cir.), 248 F. 2d 121; *Huron Portland Cement Company v. City of Detroit*, 362 U. S. 440, 80 S. Ct. 813; *Simpson v. Shepard*, 230 U. S. 352, 33 S. Ct. 729, 57 L. Ed. 1511, and *Florida Lime and Avocado Growers, Inc. v. Paul*, (DC, N.D. Cal.) 197 F. Supp. 780. This police power extends to the right of the state to regulate trade and callings concerning public health, *Polhemus v. American Medical Association*, (CCA 10th Cir.), 145 F. 2d 357.

It is clear that state action affecting interstate commerce is precluded in three types of situations: (1) where state action directly burdens interstate commerce; (2) where state action conflicts with federal regulations; and (3) where Congress has evidenced an intent to completely preempt the area of regulation involved. *Western Live Stock v. Bureau of Revenue*, 41 N. M. 141, 65 P. 2d 863; *Kelly v.*

State of Washington, 302 U. S. 1, 58 S. Ct. 87, 82 L. Ed. 3;
Central Illinois Pub. Serv. Co. v. Illinois Commerce Com-
mission, 18 Ill. 2d 506, 165 N. E. 2d 322; and *Pennsylvania*
R. Co. v. Department of Public Utility Com'rs., 14 N. J.
 411, 102 A. 2d 618.

The issues presented in this case, therefore, are: (1) Has the prohibition in Section 67-7-13(m), *supra*, against price-advertising in New Mexico in the field of optometry, as a valid exercise of the police power of the state, been superseded by federal legislation relating to advertising in interstate commerce with which it is in conflict, and (2) if Congress has not pre-empted the field of interstate advertising in the optometric field, does the enjoining of appellants from accepting and disseminating price-advertising in New Mexico from a non-resident obstruct or directly interfere with interstate commerce?

With respect to (1) above, the Federal Trade Commission Act, Title 15, Section 52, U.S.C.A., prohibits the dissemination, or causing to be disseminated, of any *false* advertising in interstate commerce, either directly or indirectly to induce, or which is likely to induce, the purchase of foods, drugs, devices or cosmetics. In holding that this is not a pre-emption by Congress of the entire field of advertising in interstate commerce so as to preclude this state from exercising its police power for a matter of local health protection, we adopt the holding in *Bedno v. Fast*, *supra*, wherein the court in dealing with this same question, at least insofar as newspaper advertising is concerned, said:

A reading of the statute [15 U.S.C.A. Sec. 52] will show that it prohibits only *false* advertising as an unfair or deceptive act in commerce. Congress has not seen fit to include within the scope of federal legislation the dissemination of truthful advertising. Thus, the federal act does not cover the subject matter of

Sec. 153.10 Stats. [Wisconsin statute similar to that of New Mexico] and does not by pre-emption preclude the state from so exercising its police power. . . . ”

With respect to radio broadcasting, Congress has occupied the field by virtue of the Federal Communications Act of 1934. *Regents of New Mexico v. Albuquerque Broadcasting Company*, (CCA 10th Cir.), 158 F. 2d 900. The express underlying purpose of this Act is to protect the public interest in interstate communication. Section 303 of Title 47, U.S.C.A. gives the Commission authority to suspend the license of any operator who transmits communications containing profane or obscene words, language, or meaning, or false or deceptive signals or communications. Section 1464, Title 18, U.S.C.A. provides for the fining and imprisonment of any person who utters any indecent, obscene or profane language by means of radio communication. These are the federal provisions with which the Pennsylvania statute was in conflict in the case of *Allen B. Dumont Laboratories v. Carroll*, (CCA Pa.), 184 F. 2d 153 cited by appellants. We find no such conflict in the case before us. The Federal Communications Act does not attempt to regulate truthful advertising by radio in interstate commerce.

In *Kelly v. State of Washington*, 302 U. S. 1, 58 S. Ct. 87, 82 L. Ed. 3, the court stated:

“ . . . The principal is thoroughly established that the exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only wherein the repugnance or conflict is so ‘direct and positive’ that the two acts cannot ‘be reconciled or consistently stand together.’ ”

The intention to supersede the exercise by the state of its police powers as to matters not covered by federal legislation is not to be implied unless the Act of Congress, fairly interpreted, is in conflict with the law of the state. In other

words, the intention of Congress to regulate exclusively under the commerce clause will not be implied unless the federal measure is plainly inconsistent with state regulation of the same subject. *Savage v. Jones*, 225 U. S. 501, 56 L. Ed. 1183; *Atlantic Coast Line Railroad Company v. Georgia*, 234 U. S. 280, 58 L. Ed. 1312; *Carey v. South Dakota*, 250 U. S. 118, 63 L. Ed. 886; *Atchison, Topeka & Santa Fe Railway Company v. Railroad Commission of California*, 283 U. S. 380, 75 L. Ed. 1128; *Mintz v. Baldwin*, 289 U. S. 346, 77 L. Ed. 1245.

Congress, in enacting legislation within its constitutional authority over interstate commerce, will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless its purpose to do so is clearly manifested, or unless the state law, in terms or in its practical administration, conflicts with the Act of Congress, or plainly and palpably infringes its policy. *Southern Pacific Company v. Arizona*, 325 U. S. 761, 65 S. Ct. 1515, 89 L. Ed. 1915; *Aladdin Industries, Inc. v. Associated Transport, Inc.*, 42 Tenn. App. 52, 298 S. W. 2d 770.

Finding no pre-emption by Congress of the entire field of advertising in interstate commerce, and no conflict between federal legislation relating to false advertising, or to false or deceptive communications and our statute seeking to regulate truthful advertising as a health and welfare measure, we must determine whether Section 67-7-13 constitutes an obstruction or direct interference with interstate commerce in violation of the federal constitution as contended by appellants.

As we construe Section 67-7-13, it contains no restrictions directed toward the regulation of interstate commerce. It does not prohibit the publication and circulation of appellants' newspaper in interstate commerce. It does not

prohibit or exclude the news media in this state from accepting advertising from citizens of other states for publication here and circulation in interstate commerce. It does not prohibit the advertising of optometric goods either in this state or in interstate commerce. It merely places a restriction, in the exercise of its police power, on the manner in which advertising in the field of optometry can be done within this state alone by "any person" and "by any means." Enjoining appellants from accepting and disseminating price-advertising by their news media in New Mexico for the benefit of a local business in Gaines County, Texas, does not affect the free flow of interstate commerce with respect to proper subjects of that commerce, or contracts for the dissemination of national or foreign news and information regarding proper subjects of commerce, as defined in the cases cited by appellants. We are in agreement with the line of reasoning, expressed in *State v. J. P. Bass Publishing Company*, 104 Me. 288, 71 A. 894, a state in which the sale or keeping for sale of intoxicating liquor was illegal, which involved a valid exercise of the police power prohibiting the advertising within the state of liquor sold or kept for sale without the state. The court said:

"... If the state cannot wholly prevent the mischief of such advertisements by excluding from the state all newspapers containing them wherever published, it may yet prevent such increase and spread of the mischief as would result from such advertisements being printed in newspapers published within its own territory. It may to that extent control the conduct of printers and publishers within its own territory...."

Having determined that Section 67-7-13(m) does not constitute an obstruction on interstate commerce, we come to appellants' second contention that the statute is an unreasonable infringement of personal property rights and an unwarranted oppressive interference with their liberty

of contract in violation of the Constitutions of the United States and of New Mexico. In support thereof, appellants rely on the case of *Little v. Smith*, 124 Kan. 237, 257 Pac. 959 in which a statute prohibited the advertising of items legally for sale within the state. It seems clear to this court that the case is not in point since we are not dealing here with the prohibition of advertising but a reasonable police regulation of the manner in which the advertising can be done in this state. Appellants quote from *Little v. Smith* as follows:

" . . . A statute restraining the liberties and property rights of citizens cannot be upheld unless it has real relation to its object and the regulations reasonably adapted to accomplish the end sought to be attained. . . . "

The court in that case found the absolute prohibition to be discriminatory, but we think there can be no question but that the valid exercise of the police power in this case has a real relation to the objects sought to be attained. As has been held by this court in *Green v. Town of Gallup*, 46 N. M. 71, 120 P. 2d 619, and *Mitchell v. City of Roswell*, 45 N. M. 92, 111 P. 2d 41, property and property rights are held subject to the fair exercise of the police power and a reasonable regulation enacted for the benefit of public health, convenience, safety of general welfare is not unconstitutional "taking of property" in violation of the contract clause, "due process" clause or "equal protection" clause of the Federal Constitution. Nor would it violate any constitutional rights guaranteed by the Constitution of New Mexico. See *Klein v. Department of Registration and Education*, 412 Ill. 75, 105 N. E. 2d 758.

" We conclude as did the trial court, enjoining the appellants from aiding and abetting a non-resident in the violation of a law of New Mexico is as essential to the administration of the provision of our statutes relating to the

practice of optometry for the health and welfare of our citizens as would be the prosecution of a resident optometrist for the same offense.

The judgment should be affirmed. It Is So ORDERED.

D

s/

J. C. COMPTON

Chief Justice

WE CONCUR:

s/

DAVID W. CARMODY

J.

s/

DAVID CHAVEZ, JR.

J.

s/

M. E. NOBLE

J.

J.

MOISE, J., not participating.

Appendix B**Order of the Supreme Court of the State of New Mexico
affirming the Judgment of the District Court of Lea County,
State of New Mexico.**

Wednesday, April 11, 1962

**NEW MEXICO BOARD OF EXAMINERS
IN OPTOMETRY,***Plaintiff-Appellee.*

vs. /

**ABNER ROBERTS; AGNES K. HEAD, d/b/a
LEA COUNTY PUBLISHING Co.;
PERMIAN BASIN RADIO CORPORATION;
and KWEW, Inc.,***Defendants-Appellants*

No. 7001

LEA COUNTY

This cause having heretofore been argued, submitted and taken under advisement, and the Court being now sufficiently advised in the premises announces its decision by Chief Justice Compton, Mr. Justice Carmody, Mr. Justice Chavez and Mr. Justice Noble concurring, Mr. Justice Moise not participating, affirming the judgment of the District Court for the reasons given in the opinion of the Court on file;

NOW, THEREFORE, IT IS CONSIDERED, ORDERED AND ADJUDGED by the Court that the judgment of the District Court within and for the County of Lea, whence this cause came into this Court, be and the same is hereby affirmed, and the cause is remanded to the said District Court of Lea County for such further proceedings therein as may be proper, if any, consistent and in conformity with said opinion and this judgment.

Appendix C**1. Decree of the District Court of Lea County, State of New Mexico, as to Abner Roberts:****DECREE**

THIS CAUSE came on to be heard on the 4th day of January, 1961; Plaintiff being represented by the Attorney General of New Mexico and by Robert F. Pyatt, Special Assistant Attorney General, and no one appearing for Defendant Abner Roberts; and it appearing to the Court that Defendant Abner Roberts was personally served with process in the State of Texas as provided by law; and Defendant Abner Roberts having failed to appear or answer the Complaint as required by law; and after examining the file and hearing the proof of Plaintiff, the Court finds:

1.

The allegations contained in Plaintiff's Complaint as to defendant Abner Roberts are true and the Court adopts such allegations as its findings of fact.

2.

Judgment should be entered as follows:

Enjoining and restraining Defendant Abner Roberts from advertising by any means whatsoever, within the State of New Mexico, the quotation of any prices or terms on eyeglasses, spectacles, lenses, frames or mountings or which quotes discounts to be offered on eyeglasses, spectacles, lenses, frames or mountings, or which in any other manner is violative of the provisions of Sec. 67-7-13(m), N.M.S.A., 1953 Compilation.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

Defendant Abner Roberts is hereby enjoined and restrained from advertising by any means whatsoever, within

the State of New Mexico, the quotations of any prices or terms on eyeglasses, spectacles, lenses, frames or mountings, or which quotes discounts to be offered on eyeglasses, spectacles, lenses, frames or mountings, or which in any other manner is violative of the provisions of Sec. 67-7-13 (m) N.M.S.A., 1953 Compilation.

/s/ JOHN R. BRAND.

2. Transcript of proceedings in the District Court of Lea County, State of New Mexico:

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that the above entitled and numbered cause came on to be heard before the Honorable John R. Brand, District Judge in and for the Fifth Judicial District, Division III, State of New Mexico, on Thursday, January 19, 1961, in the District Court of Lea County, State of New Mexico; the Plaintiff appearing through its attorney, Assistant Attorney General, Robert F. Pyatt, Esquire; Defendants Agnes K. Head and KWEW, Inc. appearing through their attorney, L. George Schubert, Esquire, Hobbs, New Mexico; Defendant Permian Basin Radio Corporation appearing through its attorney, Theodore R. Johnson, Esquire, of Williams, Johnson & Houston, Hobbs, New Mexico; Defendant Abner Roberts not appearing; both sides announcing ready for trial, the following occurred, to-wit:

.

By THE COURT: The Legislature of New Mexico passed an act prohibiting the advertisement in any form of prices of various paraphernalia sold by optometrists. That is a justifiable and reasonable exercise of the police power, for obvious reasons. Optometry is a science dealing with the public health, and it is quite permissible that the State regulate it so as to attempt to insure that it be conducted in an ethical

manner without competition attending on the sale of other goods. The Defendant Roberts is a non-resident of the State of New Mexico and beyond the jurisdiction of this Court, and his activities can not be controlled by this Court. The three other defendants engage in disseminating news, advertising matter, by newspaper and radio. They are residents of this State and within its jurisdiction. Conceding that Roberts' acts are illegal and in violation of our law, I can see no persuasive reason why the defendants should not be restrained from aiding and abetting him in the illegal act. I do not think that either *Little vs. Smith* nor the *Utah Case* are in point. There, it was permissible to sell the items under certain licensing regulations. But, the State undertook to prevent advertisement by the merchants of the fact that they had these items for sale, for legal sale. Here, it is illegal to price-advertise these items. There is no provision whereby it can be made legal. These defendants are engaged in a conspiracy to assist the Defendant Roberts in violating a law of the State of New Mexico. It so happens that in a neighboring state, there is no such act. But, the State of New Mexico is not prohibited from doing what it can to protect its citizens because the State of Texas does not see fit to take similar action. The injunction will issue to the other three defendants as prayed.

3. **Decision (Findings of Fact and Conclusions of Law) of the District Court of Lea County, State of New Mexico, as to Agnes K. Head, d/b/a, Lea County Publishing Co., Permian Basin Radio Corporation, and KWEW, Inc.**

DECISION OF THE COURT

The Court makes the following

Findings of Fact

1. Plaintiff is an agency of the State of New Mexico and brings this suit in its official capacity. Defendant Roberts is a resident of the State of Texas. Defendant Agnes K. Head is a resident of Lea County, New Mexico, and does business in such county as Lea County Publishing

Company, publishing the "Hobbs Flare", a newspaper in Hobbs, New Mexico. Defendants Permian Radio Corporation and Kwew, Inc. are corporations authorized to transact business in New Mexico, and each operates a radio transmitting station in Hobbs, Lea County, New Mexico.

2. Defendant Roberts practices optometry in Gaines County, Texas. This practice is conducted just across the New Mexico-Texas boundary, a few miles east of Hobbs, New Mexico.

3. Defendant Roberts has for some period of time conducted radio and newspaper advertising through the news media of the other defendants in this case. Such advertising consists of the quotation of prices on eyeglasses and spectacles and of the quotation of discounts to be offered on eyeglasses and spectacles. This advertising is published by the other defendants, which publishing originates in Hobbs, Lea County, New Mexico.

4. This advertising will be continued, unless permanently enjoined.

5. All defendants with the exception of Defendant Abner Roberts have been personally served with process within the State of New Mexico.

The Court adopts the following

Conclusions of Law

1. By virtue of the terms of Section 67-7-4, N. M. S. A. 1953 Comp., as amended, it is the duty of plaintiff to administer those statutes of the State of New Mexico pertaining to the practice of optometry, compiled as Sections 67-7-1 to 67-7-14, N. M. S. A. 1953 Comp., both inclusive as amended.

2. The advertising done by the Defendant Roberts and published through the newspaper and radio media of the other defendants in this case is directly in violation of

Section 67-7-13, N. M. S. A. 1953 Comp., which is one of the statutes required to be administered by the plaintiff.

3. The publication of the advertising by the defendants in this cause constitutes a violation of Section 67-7-13, N. M. S. A. 1953 Comp.

4. The defendants in this case, other than defendant Roberts, in publishing such advertising, are within the jurisdiction of the laws of the State of New Mexico, and are within the jurisdiction of this Court, and are amenable to its process.

5. The defendants in this case, other than defendant Roberts, in publishing such advertising, are aiding and abetting in, and encouraging the violation of Section 67-7-13, N. M. S. A. 1953 Comp., and such conduct by them should be permanently enjoined.

6. The enforcement of Section 67-7-13, N. M. S. A. 1953, Comp. By enjoining the defendants, other than defendant Roberts, from aiding and abetting in the violation of this section does not offend either the Constitution of the United States or the Constitution of New Mexico.

7. The granting of injunctive relief against all defendants, other than defendant Roberts, is not affected by the fact that defendant Roberts is a resident of Gaines County, Texas.

8. The provisions of Section 67-7-13, N. M. S. A. 1953, Comp., prohibiting certain price advertising and discount advertising are a valid exercise by the Legislature of the State of New Mexico of the police power, having been enacted in protection of the public health and welfare. These provisions do not offend either the Constitution of the United States or the Constitution of New Mexico.

9. Plaintiff has no plain, speedy, or adequate remedy at law, and injunctive relief is necessary.

All requested findings of fact and conclusions of law submitted by the parties and not adopted are hereby refused.

DONE This the 28th day of March, 1961.

/s/

JOHN R. BRAND

District Judge

4. Final Decree of the District Court of Lea County, State of New Mexico, as to Agnes K. Head, d/b/a Lea County Publishing Co., Permian Basin Radio Corporation and KWEW, Inc.:

FINAL DECREE

THIS CAUSE came on to be heard on the 19th day of January, 1961, defendants Agnes K. Head, d/b/a Lea County Publishing Co., and KWEW, Inc., being represented by L. George Schubert, and defendant Permian Basin Radio Corporation being represented by Theodore R. Johnson of Williams, Johnson & Houston; and plaintiff being represented by the Attorney General of New Mexico and by Robert F. Pyatt, Special Assistant Attorney General; and the parties having entered into stipulations herein as to the facts of the case and the Court having made and filed its Findings of Fact and Conclusions of Law.

1.

The Court has jurisdiction of the subject matter and of defendants Agnes K. Head, d/b/a Lea County Publishing Co., KWEW, Inc., and Permian Basin Radio Corporation, and of plaintiff New Mexico Board of Examiners in Optometry; that judgment should enter for the plaintiff granting the injunctive relief prayed for in its complaint against said defendants.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED AS follows:

Defendants Agnes K. Head, d/b/a Lea County Publishing Co., KWEW, Inc., and Permian Basin Radio Corporation are hereby perpetually enjoined and restrained from accepting or publishing within the State of New Mexico advertising of any nature from Abner Roberts which quotes prices or terms on eyeglasses, spectacles, lenses, frames, or mountings or which quotes discounts to be offered on eyeglasses, spectacles, lenses, frames or mountings or which quotes moderate prices, low prices, lowest prices, guaranteed glasses, satisfaction guaranteed or words of similar import, as prohibited by the provisions of Section 67-7-13(m), 1953 Compilation, to all of which the defendants object and except.

/s/

JOHN R. BRAND

District Judge

SUBMITTED:

/s/ ROBERT F. PYATT

Robert F. Pyatt, Special Assistant
Attorney General

/s/ L. GEORGE SCHUBERT

L. George Schubert, Attorney for
Agnes K. Head, d/b/a Lea County
Publishing Co., and KWEW, Inc.

/s/ THEODORE R. JOHNSON

Theodore R. Johnson, Attorney for
Permian Basin Radio Corporation

Appendix D

Section 67-7-13, New Mexico Statutes Annotated, 1953 Compilation:

"67-7-13. Offenses—Penalties.—Each of the following acts on the part of any person shall constitute a misdemeanor and shall be punished by a fine of not less than \$50.00 nor more than \$200.00 or imprisonment in the county jail for not less than 30 days nor more than six (6) months, or both such fine and imprisonment for the first offense, and for a second offense a fine of not less than \$200.00 nor more than \$500.00, or imprisonment in the county jail for not less than 90 days nor more than (1) year, or both such fine and imprisonment. All fines thus received shall be paid into the common school fund of the county in which such conviction takes place.

(a) The practice of optometry, or an attempt to practice optometry without a duly authorized certificate of registration as an optometrist issued by the New Mexico state board of optometry as provided in this act (67-7-1 to 67-7-14), and signed by the president and secretary of said board.

(b) Permitting any person in one's employ, supervision or control to practice optometry unless that person has a certificate of registration, as provided in this act.

(c) Obtaining, or attempting to obtain, a certificate of registration to practice optometry unless that person has a certificate of registration, as provided in this act.

(d) The making of a willfully false oath or affirmation whenever an oath or affirmation is required by this act.

(e) Falsely impersonating an optometrist of like or different name.

(f) By selling or fraudulently obtaining any optometry diploma, license, record or certificate or aiding or abetting therein.

(g) Using in connection with his name any designation tending to imply that he is a practitioner of optometry, if not the holder of a certificate of registration under the provisions of this act.

(h) Practicing optometry during the time his certificate of registration shall be suspended or revoked.

(i) Either in person or by or through solicitors or agents giving or offering to give to any person eyeglasses, spectacles or lenses, either with or without frames or mountings, as a premium or inducement for any subscription to any book, set of books, magazines, magazine, periodical or other publication, or as a premium or inducement for the purchase of any goods, wares or merchandise.

(j) Except licensed and registered optometrists and licensed and registered physicians and surgeons, having possession of any trial lenses, trial frames, graduated test cards or other appliances or instruments used in the practice of optometry for the purpose of examining the eyes or rendering assistance to anyone who desires to have an examination of the eyes, or selling lenses or duplicating or replacing broken lenses in spectacles or eyeglasses, except upon the prescription of a regularly licensed and registered optometrist or physician and surgeon.

(k) The making of a house to house canvass either in person or through solicitors or associates for the purpose of selling, advertising or soliciting the sale of eyeglasses, spectacles, lenses, frames, mountings, eye examinations or optometrical services.

(l) The peddling of eyeglasses, spectacles or lenses from house to house or on the streets or highways, notwithstanding any law for the licensing of peddlers.

(m) Advertising by any means whatsoever the quotation of any prices or terms on eyeglasses, spectacles, lenses, frames or mountings, or which quotes discount to be offered

on eyeglasses, spectacles, lenses, frames or mountings or which quotes 'moderate prices,' 'low prices,' 'lowest prices,' 'guaranteed glasses,' 'satisfaction guaranteed,' or words of similar import.

(n) The violation of any of the provisions of this act for which the penalty has not been elsewhere provided in this act."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 392

AGNES K. HEAD, d b a LEA COUNTY PUBLISHING
CO., AND PERMIAN BASIN RADIO CORPORATION,

Appellants,

against

NEW MEXICO BOARD OF EXAMINERS
IN OPTOMETRY,

Appellee.

**ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW MEXICO**

BRIEF FOR THE APPELLANTS

CAROL J. HEAD
Eleven Broadway,
New York 4, New York
Counsel for Appellants

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1962

No. 392

AGNES K. HEAD, d b a LEA COUNTY PUBLISHING CO., AND
PERMIAN BASIN RADIO CORPORATION,

Appellants,

against

NEW MEXICO BOARD OF EXAMINERS IN OPTOMETRY,

Appellee.

**ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW MEXICO**

BRIEF FOR APPELLANTS

OPINION BELOW

The opinion of the Supreme Court of the State of New Mexico (R. 43-52) is reported at 70 N.M. 90, 370 P. 2d 811 (1962). The oral ruling *per* Judge Brandt in the District Court of Lea County, State of New Mexico (R. 28) and the District Court's decision (findings of fact and conclusions of law) (R. 18-20), and final decree (R. 20-21) have not been officially reported.

JURISDICTION

The final judgment of the Supreme Court of the State of New Mexico (R. 52-53) was entered on April 11, 1962. Appellants' notice of appeal (R. 54-57) was filed on July 6,

1962 and this Court noted probable jurisdiction on November 13, 1962 (R. 57). The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (2).

QUESTIONS PRESENTED

Whether Section 67-7-13 of New Mexico Statutes Annotated, 1953 Compilation (hereinafter cited as "N.M.S.A., 1953"), as applied to appellants, residents of New Mexico who in New Mexico are engaged in interstate commerce through the publishing of a newspaper and the operation of a radio station, respectively, having circulation and broadcast coverage in both New Mexico and states other than New Mexico, in prohibiting, and the action of the New Mexico courts thereunder enjoining, appellants from publishing and disseminating in the State of New Mexico certain commercial advertising of eyeglasses, lenses and frames and services relating thereto by a resident of the State of Texas practicing optometry and offering such advertised articles and services for sale only in the State of Texas, is:

- (1) unconstitutional as an undue and unreasonable burden on interstate commerce under the "Commerce Clause" of the United States Constitution, Article I, Section 8, Clause 3;
- (2) unconstitutional under Section 1 of the Fourteenth Amendment to the United States Constitution, either as an abridgment of their privileges and immunities as citizens of the United States, or as a deprivation of their property without due process of law, or as a denial to them of equal protection of the laws;
- (3) as to appellant Permian Basin Radio Corporation, unconstitutional under Article VI, Clause 2, of the United States Constitution by reason of the preemption of the Federal Communications Act.¹

¹ While the question of possible preemption was raised in Appellants' Jurisdictional Statement (p. 15) as related to the question of the burden of New Mexico's action upon interstate commerce, the question was not separately stated among the

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States: Article I, Section 8, Clause 3; Article VI, Clause 2; Fourteenth Amendment, Section 1.

Section 67-7-13, N.M.S.A., 1953, which is reprinted in Appendix A hereto; and the Communications Act of 1934, as amended, 48 Stat. 1064, 47 U.S.C. 151, et seq., relevant provisions of which are printed in Appendix B hereto.

STATEMENT

The Parties

Appellant Agnes K. Head (hereinafter called "Head") (a defendant below) is a resident of Hobbs, Lea County, New Mexico, where she does business as Lea County Publishing Company, publishing a newspaper called the "Hobbs Flare" (R. 2, 18, 28, 44-45). In addition to its circulation in New Mexico, this newspaper has circulation in thirteen states and the District of Columbia, including circulation in some twenty-seven communities in the State of Texas (Appellant Head Ex. C., R. 29-30, 37). Appellant Permian Basin Radio Corporation (hereinafter called "Permian") (also a defendant below), a corporation, owns and operates in Hobbs, Lea County, New Mexico, Radio Station KHOB, having broadcast coverage in New Mexico and Texas. It

questions presented by this appeal either in Appellants' Notice of Appeal (R. 56-57) or the Jurisdictional Statement (p. 2-3). This Court's order noting probable jurisdiction (R. 57), stated:

"The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. In addition to the questions listed in the jurisdictional statement, the parties are requested to address themselves to the issue of possible federal preemption by reason of the Federal Communications Act. The Solicitor General is also invited to express the views of the Federal Communications Commission on this issue."

As Appellant Agnes K. Head is not engaged in radio broadcasting, this question will be discussed only with respect to Appellant Permian Basin Radio Corporation.

receives news coverage from certain cities in Texas and broadcasts advertising from national advertising concerns and for firms and merchants situated in Texas (R. 2, 18, 27-28; Appellant Permian Ex. 1, R. 38-39; R. 44-45).

Appellee is an agency of the State of New Mexico and is charged with the administration of New Mexico's laws (Sections 67-7-1 through 67-7-14, N.M.S.A., 1953) relating to the practice of optometry (R. 2, 18-19).

Also defendants below, but not parties to this appeal, were Abner Roberts (hereinafter called "Roberts"), an optometrist residing and practicing optometry in Gaines County, Texas, just across the Texas-New Mexico border and a few miles east of Hobbs, New Mexico, and KWEW, Inc. (hereinafter called "KWEW"), the operator in Hobbs, New Mexico of Radio Station KWEW. (R. 18, 28, 44-45).

The Litigation

In September 1960, Appellee commenced an action in the District Court of Lea County, New Mexico, against Appellants Head and Permian, and the other Defendants Roberts and KWEW, seeking to enjoin Appellants Head and Permian and KWEW from accepting and publishing and broadcasting in New Mexico certain advertising by Roberts, which quoted prices or discounts on eyeglasses in alleged violation of Section 67-7-13, N.M.S.A., 1953 (R. 1-3). Roberts did not appear, although he was apparently served with process in Texas, and on January 4, 1961 the District Court entered a decree enjoining him from price advertising eyeglasses in New Mexico (R. 9-10). A copy of this decree was served on Roberts in Texas on January 20, 1961 (R. 12).

Appellants Head and Permian and KWEW appeared in the action and in their answers they raised, among others, the same defenses as are now presented on this appeal (R. 4-15).

Following appellee's motion for summary judgment, the matter was heard by the District Court on January 19, 1961. The evidence presented consisted of certain stipulations, including stipulations that appellants Head and Permian

and KWEW had accepted price advertising from Roberts by telephone, and would continue to do so unless enjoined by the court. In announcing its ruling that an injunction would issue as prayed, the District Court stated that Roberts was a non-resident of New Mexico and, beyond the jurisdiction of that court, that his activities could not be controlled by the court, and that Texas had no such act as appellee sought to enforce. However, the District Court further stated that Roberts' acts were illegal and that the other defendants were engaged in a conspiracy to assist him and should be restrained (R. 28).

Accordingly, on March 28, 1961 the District Court rendered its formal decision (finding of fact and conclusions of law) (R. 18-20), and on April 7, 1961 the District Court filed its final decree perpetually enjoining and restraining appellants Head and Permian and KWEW "from accepting or publishing within the State of New Mexico advertising of any nature from Abner Roberts which quotes prices or terms on eyeglasses, spectacles, lenses, frames or mountings or which quotes moderate prices, low prices, lowest prices, guaranteed glasses, satisfaction guaranteed, or words of similar import, as prohibited by the provisions of Section 67-7-13 (m), 1953 Compilation. . ." (R. 20-21).

Appellants Head and Permian and KWEW appealed the decision of the District Court to the New Mexico Supreme Court (R. 22-23), raising before that court the same defenses under the United States Constitution as had been raised below (R. 44-52). Roberts, not having appeared, did not appeal. The New Mexico Supreme Court, after written briefs and oral argument were presented, affirmed the District Court on April 11, 1962 (R. 52-53).

Appellants Head and Permian filed their notice of appeal of that decision to this Court with the Clerk of the Supreme Court of New Mexico on July 6, 1962 (R. 54-57). KWEW has apparently not appealed that decision.

SUMMARY OF ARGUMENT

The state court erred in considering the enjoining of appellants as a permissible regulation of matters of purely

local concern. Appellants are engaged in interstate commerce and their dissemination of price advertising of a Texas optometrist was part of that commerce. New Mexico in effect is attempting to regulate not a local matter but the practice of optometry in Texas. The clear effect of this restraint, which prevents the business of New Mexico and Texas residents from flowing to Roberts and prevents Roberts' advertising from flowing to appellants, constitutes an unreasonable burden on interstate commerce in violation of the Commerce Clause. It opens the door to widespread rivalries among States and appellants submit, should not be sanctioned. See e.g. *Baldwin v. G. A. F. See-ling*, 294 U.S. 511 (1935).

The state's action is all the more unprotected so far as it relates to appellant Permian, a radio station operator, for by the Federal Communications Act Congress has so fully occupied the field of regulation of radio as to preempt the area from state regulation. This Act meets all of the three separate standards by which preemption is normally tested. *Pennsylvania v. Nelson*, 350 U.S. 497, 502-505 (1956): The Act itself establishes a comprehensive scheme of federal regulation and the courts and Federal Communications Commission have so construed the Act; the federal interest must be dominant to that of the states because of the number of radio facilities which may be operated and the inherent interstate nature of radio broadcasting; and there is already a serious conflict between the provisions of the Act and New Mexico's regulation of Permian, and similar potential conflicts attend any similar state regulation of broadcasting. See e.g. *Federal Communications Commission v. Pottsville*, 309 U.S. 134 (1940). While there is an undoubted area in which states may regulate broadcasters despite the federal preemption, we submit that the injunction in question does not fall within that permissible area. See *Regents of the University System of Georgia v. Carroll*, 338 U.S. 586 (1950).

As to both appellants New Mexico's action constitutes an invalid previous restraint on their publishing and broadcasting. As such it deprives them of their property with-

out due process of law in violation of the Fourteenth Amendment. The matter they have been prevented from disseminating is, admittedly, commercial advertising. But appellants submit that such advertising is entitled to Constitutional protection. The prior cases of this Court according less protection to commercial matter should not control a case such as this, which involves communications media disseminating both non-commercial and commercial material. See e.g. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936; cf. *Valentine v. Christensen*, 316 U.S. 52 (1942).

Appellants also urge that aside from the previous restraint aspect of the injunction, New Mexico's objective of protecting its citizens' eyesight does not justify prohibiting appellants from disseminating price advertising of a Texas optometrist. The extension of the New Mexico law to cover that advertising is wholly unjustified and unreasonable and its effect is to deprive appellants of their property without due process. See *Nebbia v. New York*, 291 U.S. 502, 525 (1934); *Muller v. Louisiana*, 165 U.S. 578 (1897).

Finally, as to appellant Head, an individual, the injunction in question deprives her of her right to engage in interstate commerce and as such deprives her of her privileges and immunities as a citizen of the United States. See *Lorell v. City of Griffin*, 303 U.S. 444 (1938).

ARGUMENT

I

Section 67-7-13 of N.M.S.A., 1953, as applied by the Supreme Court of the State of New Mexico in restraining appellants from publishing and broadcasting price advertising of an optometrist residing and practicing optometry in Texas, is unconstitutional as an undue and unreasonable burden upon interstate commerce.

In affirming the judgment of the lower court in enjoining appellants, the New Mexico Supreme Court concluded that:

As we construe Section 67-1-13, it contains no restrictions directed toward the regulation of interstate commerce. It does not prohibit the publication and circulation of appellants' newspaper in interstate commerce. It does not prohibit or exclude the news media in this state from accepting advertising from citizens of other states for publication here and circulation in interstate commerce. It does not prohibit the advertising of optometric goods either in this state or in interstate commerce. It merely places a restriction, in the exercise of its police power, on the manner in which advertising in the field of optometry can be done within this state alone by 'any person' and 'by any means.' Enjoining appellants from accepting and disseminating price-advertising by their news media in New Mexico for the benefit of a local business in Gaines County, Texas, does not affect the free flow of interstate commerce with respect to proper subjects of that commerce, or contracts for the dissemination of national or foreign news and information regarding proper subjects of commerce, as defined in the cases cited by appellants." (R. 50)

As this portion of its opinion indicates, the state court proceeded from the premise that prohibiting advertising the price of an article of commerce was a permissible regulation under the state's police power, even though total prohibition of all advertising might not be. Other portions of its opinion bear this out. Thus, on this same question the court also stated that:

"We have no quarrel with the decisions in these cases insofar as they deal with the prohibition by a state of all advertising relating to a commodity moving in interstate commerce into its state from another state for legal sale in its original package, . . ." (emphasis the court's) (R. 46)

In addition, in discussing appellant's contention that the state's action deprived them of property without due process, the court concluded that the case of *Little v. Smith*, 124 Kan. 237, 257 Pac. 959 (1927) "is not in point since we are not dealing here with the prohibition of advertising but a

reasonable police regulation of the manner in which the advertising can be done in this state." (R. 51)

We submit that the New Mexico court's action and the statute in question cannot be so simply justified.

Roberts is an optometrist residing and practicing in Texas, a few miles from Hobbs, New Mexico, where appellant Head publishes the Hobbs Flare and appellant Permian operates KHQB. In an effort to attract patients he advertised, via appellants' media, the prices at which he would fit glasses.² Some of the patients he could hope to attract would undoubtedly reside in New Mexico. But New Mexico residents are not the only patients he could hope to attract. Appellant Head's newspaper has circulation in thirteen other states and, more importantly, in some twenty-six Texas communities in the immediate trade territory (R. 37). Similarly, appellant Permian's radio station has considerable broadcast coverage in Texas,³ in many of these same communities (R. 38-39).

The distinction the New Mexico court seeks to draw between a total prohibition against advertising and a mere regulation of the manner of advertising through prohibiting the price at which advertised, is wholly unsupportable. Obviously, one would not expect residents of New Mexico who live in or near Hobbs, or such nearby communities as Lovington or Eunice to travel across the state line to

² As the New Mexico District Court found, Texas has no statute prohibiting the price advertising of eyeglasses. (R. 28). A Texas statute does prohibit the publishing of "any statement or advertisement concerning ophthalmic lenses, frames, eye-glasses, spectacles or parts thereof which is fraudulent, deceitful, misleading, or which in any manner whatsoever tends to create a misleading impression, including statements or advertisements of bait, discount, premiums, price, gifts or any statements or advertisements of a similar nature, import or meaning." (Vernon's Texas Civil Statutes, Art. 4565g). No claim is made here that Roberts' advertising was in any way fraudulent, deceitful or misleading, and no such issue is before the Court.

³ Indeed, because Hobbs is located in the Southeast corner of New Mexico, an even greater portion of appellant Permian's broadcast coverage would appear to be in Texas. (R. 38-39).

have their eyeglasses fitted by Roberts unless they knew in advance that the prices at which Roberts fits eyeglasses were competitive with or lower than the prices charged by local optometrists. The same would reasonably be true as to residents of Texas who live in or near such communities as Seagraves, Seminole, or Andrews.

The effect of the state court's action, therefore, is not only to prevent residents of New Mexico from learning at what price Roberts will fit eyeglasses, but to prevent Texas residents from obtaining this information. Not knowing this price, they are effectively foreclosed from doing business with Roberts. We submit that no clearer burden on interstate commerce could be presented. Having been enjoined by the New Mexico courts, appellants are as much the victims of that burden as Roberts.

As this Court pointed out so vividly in *Baldwin v. G. A. F. Seelig*, 294 U.S. 511 (1935), it was the purpose of the commerce clause⁴ to prevent this sort of burden on commerce among the several states. In that case, in holding that New York could not regulate the price paid milk producers in Vermont by prohibiting the sale in New York of milk acquired from Vermont where the price paid the Vermont producers was less than would be owing to New York producers, the Court stated:

"Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported. Imposts or duties upon commerce with other countries are placed by an express prohibition of the Constitution, beyond the power of a state, 'except what may be absolutely necessary for executing its inspection laws.' Constitution, Art. I, Sec. 10, clause 2; *Woodruff v. Parham*, 8 Wall. 123. Imposts and duties upon interstate commerce are placed beyond the power of a state, without the mention of an exception, by the provision committing commerce of that order to the power of the Congress.

⁴United States Constitution, Article I, Section 8, clause 3:
"The Congress shall have Power.

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Constitution, Art. I, Sec. 8, clause 3. "It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business." *International Textbook Co. v. Pigg*, 217 U.S. 91, 112; and see *Brennan v. Titusville*, 153 U.S. 289; *Brown v. Houston*, 114 U.S. 622; *Webber v. Virginia*, 103 U.S. 344, 351; *Kansas City Southern Ry. Co. v. Kaw Valley Drainage District*, 233 U.S. 75, 79. Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis. We are reminded in the opinion below that a chief occasion of the commerce clauses was "the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation." Farrand, *Records of the Federal Convention*, vol. II, p. 308; vol. III, pp. 478, 547, 548; *The Federalist*, No. XLII; Curtis, *History of the Constitution*, vol. 1, p. 502; Story on the Constitution, Sec. 259. If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation." 294 U.S. 511, 521-522.

A. The advertising which appellants have been enjoined from publishing or broadcasting is itself a part of interstate commerce.

It should be noted initially that the wisdom of the New Mexico statute regulating the practice of optometry is not here in question, for in *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), this Court upheld an Oklahoma statute regulating the practice of optometry and restricting advertising by optometrists. There are significant differences between that case and appellants' case. The Oklahoma statute restricted only advertising by optometrists and had a specific proviso to the effect that the Act should not render any newspaper or other advertising media liable for publishing any advertising furnished them by a vendor.

(348 U. S. 483, 488, n 2). Moreover, the complaining parties were Oklahoma residents complaining about the effect of the statute in Oklahoma and no issue of interstate commerce was involved or considered.⁵

But there is a fundamental issue of interstate commerce involved in appellants' case. Appellants are engaged in interstate commerce and the very advertising they have been enjoined from disseminating is a part of that commerce. *Lorain Journal v. U. S.*, 342 U. S. 143 (1951); *Farmer's Guide Co. v. Prairie Co.*, 293 U. S. 268 (1934); *Scripps-Howard-Radio v. Federal Communications Commission*, 316 U. S. 4 (1942); *Fisher's Blend Station v. Tax Commission*, 297 U. S. 650 (1936).

B. Restrictions placed on the advertising of alcoholic beverages are not controlling as to other legitimate subjects of interstate commerce.

In holding that no undue burden on interstate commerce was here involved, the New Mexico Supreme Court stated that it was in agreement with the line of reasoning expressed in *State v. J. P. Bass Publishing Company*, 104 Me. 288, 71 Atl. 894 (1963). In that case the Supreme Court of Maine upheld the defendant's conviction for publishing in Maine an advertisement for the sale of intoxicating liquor placed by a firm in Massachusetts. In Maine the sale and advertising for sale of liquor was illegal, whereas in Massachusetts it was legal. Rejecting a defense based on the commerce clause, the Court affirmed the conviction on the basis of *Delamater v. South Dakota*, 205 U. S. 93 (1907). It considered that even if it could not prevent an out-of-state newspaper advertising liquor from coming into Maine, it could prevent such advertising by those within its own territory.

⁵ In the *Williamson* case the Court placed considerable reliance on *Seidler v. Dental Examiners*, 294 U. S. 608 (1935), in which the Court upheld as valid an Oregon statute providing that a dentist's license could be revoked for various advertising, including price advertising. No issue of interstate commerce was involved in that case, and there is a fundamental difference between prohibiting a licensed professional from advertising and prohibiting communications media such as here from disseminating advertising.

That case does ~~not~~ in the least support the restraint here imposed on appellants. Intoxicating liquor historically has been treated as a special category as regards the right of the states to regulate its flow in interstate commerce. This distinction was noted by this Court in *Delamater v. South Dakota*, *supra*, where the Court stated that, as the matter involved liquor, South Dakota's conviction of Delamater for soliciting liquor sales in South Dakota without a license did not require the Court to determine whether the restraints of the South Dakota statute would be a direct burden on interstate commerce if generally applied to subjects of commerce (205 U. S. 93, 97). Cases involving interstate commerce in liquor are not controlling authority as to other subjects of commerce, *Carter v. Virginia*, 321 U. S. 131 (1944), and the reliance of the New Mexico Supreme Court thereon is misplaced.

Other courts have reached results similar to those in the Bass case, *supra*. Thus, in *State v. State Capital Co.*, 24 Okla. 252, 103 Pac. 1021 (1909), it was held that Oklahoma could enjoin an Oklahoma newspaper from advertising intoxicating liquor for sale by a Kansas City, Missouri firm, and in *Advertiser Co. v. State*, 193 Ala. 418, 69 So. 501 (1915), it was held that Alabama could enjoin similar advertising. Indeed, some courts have even gone further than the Bass case. In *State v. Davis*, 77 W. Va. 271, 87 S. E. 262 (1915), it was held that a Maryland resident who mailed a circular advertising liquor to West Virginia violated West Virginia's law prohibiting the advertising of liquor, and in *State v. Delaye*, 193 Ala. 500, 68 So. 993 (1915), Delaye, a newsdealer, was enjoined from selling an out-of-state newspaper which contained advertisements of liquor.

Not all cases have reached this result, however, even with respect to liquor. On the contrary, in *R. M. Rose Co. v. State*, 133 Ga. 353, 65 S. E. 770 (1909), the court concluded that despite the Wilson Act and the *Delamater* case, *supra*, Georgia could not, under its law prohibiting the sale or solicitation of the sale of liquor, punish a Tennessee resident who sent circulars soliciting such sales through the mails from Tennessee to Georgia. Cf. *State Board v.*

Young's Market Co., 299 U. S. 59 (1936). Moreover, in *State v. Davis; supra*, the court stated that prior to the Wilson Act the soliciting of orders by advertisement, if resulting in the sale of liquor located outside the state, would be protected from interference by the state as a part of interstate commerce.

As to articles of commerce other than liquor, however, the courts have been uniform. They have concluded that states may not prohibit the advertising in one state of articles legitimately for sale in another. The case most nearly analogous to our case is that of *State v. Salt Lake Tribune Pub. Co.*, 68 Utah 87, 249 Pac. 474 (1926). In that case the respondent published in Utah a newspaper having circulation in other states. The Supreme Court of Utah reversed the respondent's conviction for having published an advertisement for cigarettes in violation of a statute prohibiting such advertisement but allowing the sale of cigarettes upon proper licensing. The court held that the statute as applied constituted an undue interference with interstate commerce. In so holding the court distinguished *State v. J. P. Bass Publishing Company*, 104 Me. 288, 71 Atl. 894 (1908) because that decision was concerned with advertisements of liquor, which was not within the protection of the commerce clause, and relied instead on *Post Printing & Publishing Co. v. Brewster*, 246 Fed. 321 (D. Kan. 1917).⁶

In the latter case the United States District Court for Kansas held that a newspaper publisher who published in Missouri but circulated its papers in Kansas, could not be prohibited by Kansas from selling in Kansas papers con-

⁶ Compare *Little v. Smith*, 124 Kan. 237, 257 Pac. 959 (1927), where, under circumstances similar to those in the *Salt Lake Tribune* case, the Supreme Court of Kansas held that prohibiting Kansas newspapers from publishing advertising of cigarettes, which competing papers published outside of Kansas could publish, was unconstitutional as a denial of the due process, equal protection and privileges and immunities clauses of the United States Constitution. While the court discussed the *Salt Lake Tribune* case and the newspaper's contention that the Kansas act under attack unduly burdened interstate commerce, the court seemingly did not actually decide the case on that point.

taining cigarette advertisements. The advertising of cigarettes was lawful in Missouri but not in Kansas.

Therefore, even if Roberts were merely a merchant advertising a product other than liquor which he would send from Texas to New Mexico upon receipt of orders, we submit that the *Salt Lake Tribune* and *Post Printing* cases would be far sounder authority than that on which the New Mexico court relied, and, indeed, that even the *Bass* case and the other cited cases involving liquor are authority supporting appellants' position. For in such case, the articles of commerce would be legitimate articles of commerce,⁷ and Roberts would be entitled to sell and appellants to advertise them for sale in interstate commerce.

C. New Mexico has no authority to legislate with regard to the practice of a Texas optometrist fitting eyeglasses in Texas.

Roberts is not, however, merely selling an item which he sends through the mails or otherwise from Texas to New Mexico. Rather, he is a Texas optometrist who fits eyeglasses in Texas, and as such his advertising via appellants' newspaper and radio station must clearly have as its object the inducing of both residents of Texas and New Mexico to come to his place of business in Texas for the purpose of being fitted. In view of this, to the extent that any of the foregoing cases hold that a state may prohibit advertising, they are even less apposite.

Other authorities of this Court uphold appellants' position. In *Baldwin v. G. A. F. Seelig*, 294 U. S. 511 (1935), cited earlier, this Court held that New York could not, as a condition to licensing him to sell milk in New York, compel a person to pay a minimum price set by New York for milk

⁷ Compare *Clason v. Indiana*, 306 U. S. 439 (1939), in which this Court upheld Indiana's prohibition against transporting large dead animals out of Indiana on the ground that Indiana had not recognized dead horses as legitimate articles of commerce. No such consideration is involved here, for eyeglasses are clearly legitimate articles of trade. New Mexico's effort to regulate the advertising of the price thereof does not make them less so, especially where, as here, the eyeglasses are for sale by a Texas optometrist.

purchased in Vermont. The Court stated that the price to be paid producers in Vermont was Vermont's concern, not New York's, and that such a regulation was an undue burden on interstate commerce.

In that case, New York contended that its efforts to set the price of milk in Vermont were not aimed at the economic welfare of farmers, but at the maintenance of a regular and adequate supply of pure and wholesome milk (294 U. S. 511, 522-523). In rejecting any such contention, this Court stated:

"Price security, ~~we~~ ^{we} are told, is only a special form of sanitary security; the economic motive is secondary and subordinate; the state intervenes to make its inhabitants healthy, and not to make them rich. On that assumption we are asked to say that intervention will be upheld as a valid exercise by the state of its internal police power, though there is an incidental obstruction to commerce between one state and another. This would be to eat up the rule under the guise of an exception. Economic welfare is always related to health, for there can be no health if men are starving. Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.

"We have dwelt up to this point upon the argument of the state that economic security for farmers in the milkshed may be a means of assuring to consumers a steady supply of a food of prime necessity. There is, however, another argument which seeks to establish a relation between the well-being of the producer and the quality of the product. We are told that farmers who are underpaid will be tempted to save the expense of sanitary precautions. This temptation will affect

the farmers outside New York as well as those within it. For that reason the exclusion of milk paid for in Vermont below the New York minimum will tend, it is said, to impose a higher standard of quality and thereby promote health. We think the argument will not avail to justify impediments to commerce between the states. There is neither evidence nor presumption that the same minimum prices established by order of the Board for producers in New York are necessary also for producers in Vermont. But apart from such defects of proof, the evils springing from uncared for cattle must be remedied by measures of repression more direct and certain than the creation of a parity of prices between New York and other states. Appropriate certificates may be exacted from farmers in Vermont and elsewhere (*Mintz v. Baldwin*, 289 U.S. 346; *Reid v. Colorado*, 187 U.S. 137); milk may be excluded if necessary safeguards have been omitted; but commerce between the states is burdened unduly when one state regulates by indirection the prices to be paid to producers in other, in the faith that augmentation of prices will lift up the level of economic welfare, and that this will stimulate the observance of sanitary requirements in the preparation of the product. The next step would be to condition importation upon proof of a satisfactory wage scale in factory or shop, or even upon proof of the profits of the business. Whatever relation there may be between earnings and sanitation is too remote and indirect to justify obstructions to the normal flow of commerce in its movement between states. Cf. *Shell v. Kansas*, 209 U.S. 251, 256; *Railroad Co. v. Husen*, 95 U.S. 465, 472. One state may not put pressure of that sort upon others to reform their economic standards. If farmers or manufacturers in Vermont are abandoning farms or factories or are failing to maintain them properly, the legislature of Vermont and not that of New York must supply the fitting remedy."

In effect, as here applied, New Mexico, by Section 67-7-13, N.M.S.A., 1953, is attempting objectives similar to those of New York in the *Baldwin* case, and under the same guise. Thus, the New Mexico Supreme Court stated that Section 67-7-13 was enacted by New Mexico "to protect its citizens against the evils of price advertising methods

tending to satisfy the needs of their pocketbooks rather than the remedial requirements of their eyes." (R. 46). The question of whether this may be a legitimate objective as applied to New Mexico optometrists is not in issue in this case. What is in issue is whether the state of New Mexico may effectively prevent price advertising in interstate commerce by an optometrist residing and practicing in Texas, when such advertising is not prohibited in Texas. The *Baldwin* case suggests clearly that this latter objective is not legitimate and that the injunction should not stand.

D. The injunction has a direct and substantial effect on interstate commerce and may not be justified as an exercise of state police powers.

The New Mexico court considered that the statute in question was a valid exercise of the state's police power, and that the state was not wholly precluded from exercising its police power in such a matter of local concern, even though its exercise might indirectly affect interstate commerce. (R. 47)

The effect of New Mexico's enjoining appellants from carrying Roberts' price advertising, however, is far from indirect, as has been shown. The fact that it purports to have been accomplished as an exercise of the state's police power cannot justify the restraints in question. See *Western Union Tel. Co. v. Foster*, 247 U.S. 105, 114 (1918); *Baldwin v. G.A.F. Seelig*, *supra*, at p. 527.

Equally in point with the *Baldwin* case is the *Foster* case, *supra*. There the New York Stock Exchange contracted with Western Union to furnish it with stock quotations, which the latter in turn would furnish to various subscribers approved by the Exchange. The quotations were sent by the Exchange from New York to Boston, Massachusetts, where Western Union decoded them and relayed them by ticker to the subscribers. This Court held that the transmission of quotations remained in interstate commerce until completed in the subscribers' offices and that an order of the Massachusetts Public Service Commission requiring Western Union to cease discriminating against

a would-be subscriber disapproved by the Exchange was invalid as a direct interference with interstate commerce.

The analogy to our case is strong. When Roberts communicates advertisements to appellants, this is clearly interstate commerce. But the communication does not rest there, for the advertising is communicated to appellants for dissemination via their respective newspaper and radio station. This dissemination, too, is interstate commerce, no less in our case than in the *Foster* case, *supra*, and the burden on interstate commerce is as direct here as there.*

E. New Mexico may not prevent its residents from traveling to Texas to make purchases lawful in Texas.

As stated, in advertising with appellants, Roberts reaches not only residents of Texas and other states, but residents of New Mexico. Whatever may be the right of New Mexico to limit its residents' activities in New Mexico, it cannot limit their lawful activities in other states. As citizens of the United States, they have the clear and unobstructible right to purchase eyeglasses from Roberts in Texas. *Allgeyer v. Louisiana*, 165 U. S. 578 (1897); *St. Louis Compress Co. v. Arkansas*, 260 U. S. 346 (1922). New Mexico, therefore, clearly could not prevent its residents from traveling between New Mexico and Texas for the lawful purpose of purchasing eyeglasses from Roberts. *Edwards v. California*, 314 U. S. 160 (1941). Yet the effect of its action is the same. By forbidding from its residents advertising information as to articles legitimately for sale in Texas, New Mexico effectively prevents its residents

* Compare *Nat. v. Delaye*, 193 Ala. 500, 68 So. 993, (1915), cited *supra*, where the court upheld the enjoining of Delaye from selling out of state newspapers on the theory that once the newspapers had come into Alabama and were commingled with the mass of property in the state, they were not in the "original package" and were subject to Alabama's laws. Compare also *Parker v. Brown*, 317 U. S. 341 (1943), where this Court held that California's marketing program for California grown raisins was local regulation of interstate business even though such regulation had the effect of preventing commerce in raisins.

from traveling to Texas for that purpose almost as if they were prohibited by law from making such purchases. This too unduly burdens⁹ interstate commerce and appellants are again among the victims of that burden.

F. The validation of restrictions such as here imposed would open the door to widespread limitations on advertising in interstate commerce.

Appellants are not unaware of the many cases in which this Court has upheld state action affecting interstate commerce. See *California v. Thompson*, 313 U. S., 109, 113 (1941); *DiSanto v. Pennsylvania*, 273 U. S. 34, 40 (1927). We submit that those cases are not controlling. This is not a matter of mere local concern to the state of New Mexico. New Mexico is not alone in enacting statutes prohibiting various types of advertising, although it has its fair share. Other states, including Texas, have similar statutes,¹⁰ and this fact emphasizes the importance of the issue of whether one state can lawfully restrict advertising with advertising media normally engaged in serving not only that state but other states whose laws may be different and into which residents of the former may travel for commercial purposes. If New Mexico can validly restrict appellants' publishing and broadcasting of price advertisements on eyeglasses, then it surely can as easily restrict their dissemination of advertising placed by non-residents but within the literal proscriptions of the other statutes.

If every state could thus restrict advertising by non-residents with media having interstate circulation or coverage, the disruption to interstate commerce would be great and far reaching. This genuinely potential disruption should not be sanctioned by this Court.

⁹ See also *Hood & Sons v. DuMond*, 336 U. S. 525 (1949); *Dean Milk Co. v. Madison*, 340 U. S. 349 (1951); *Schollenberger v. Pennsylvania*, 171 U. S. 1 (1898). Compare *Florida Lime & Avocado Growers, Inc. v. Paul*, 197 F. Supp. 780 (N.D. Cal., 1961), probable jurisdiction noted 368 U. S. 964 (1962).

¹⁰ For a comprehensive collection of various state statutes on advertising, see the Appendix of Note, *The Regulation of Advertising*, 56 Col. L. Rev. 1018, 1097-1111.

II

By the Communications Act of 1934, 48 Stat. 1064, 47 U.S.C. Sections 151, et seq., Congress occupied the field of regulation of radio broadcasting in its entirety, and New Mexico's enjoining of appellant Permian from broadcasting prices advertising of a Texas optometrist is an invalid incursion into an area reserved for federal regulation.

As this Court indicated in *Pennsylvania v. Nelson*, 350 U. S. 497, 302-505 (1956), there are three basic standards by which it is determined whether a federal scheme of regulation covers an area of activity so completely as to preempt it and thereby preclude state regulation in the same area: (1) is the scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for supplemental state regulation; (2) is there a federal interest in the area so dominant as to preclude state regulation in the same area; or (3) does regulation by the state present a danger of conflict with federal regulation?

Applying essentially these standards this Court has concluded that federal regulation preempted such diverse areas as internal subversion, *Pennsylvania v. Nelson*, *supra*; collective bargaining, *Hill v. Florida*, 325 U. S. 538 (1945); alien registration, *Hines v. Davidowitz*, 312 U. S. 52 (1941); and carrier liability for damage, *Charleston & Western Carolina Railway Co. v. Tarboro Co.*, 237 U. S. 597 (1915).

On the other hand, the Court has reached an opposite result in such equally diverse areas as control of emission of smoke by vessels, *Huron Portland Cement Co. v. City of Detroit*, 362 U. S. 440 (1960), and regulation of customhouse brokers, *Union Brokerage Co. v. Jensen*, 322 U. S. 202 (1944).

Seemingly more in point here, perhaps, than any of the foregoing are the cases of *Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U. S. 27 (1919), and *Western Union Tel. Co. v. Boggs*, 251 U. S. 315 (1920). In *Postal Telegraph* the Court held that by the Act of June 18, 1910, c. 309, 36 Stat. 539, 545, Congress had preempted the field of regulation of the interstate business of telegraph

companies so that the validity of contracts for rates of messages was not determinable by state law. In the *Bogli* case the Court held that the same Act brought telegraph companies under administrative control of the Interstate Commerce Commission and so subjected them to a uniform national rule as to preclude the states from inflicting penalties for failure to make prompt delivery of interstate messages. However, as broadcasters are not common carriers, 47 U. S. C. §153 (h) (1958); *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U. S. 470 (1940), these cases are not, in fact, more pertinent than the other cited cases which have found federal preemption.

A. Regulation of the contents of broadcasters' programs, both with regard to advertising and other matters, has been fully occupied by Congress under the Communications Act.

The case most closely in point is clearly that of *Allan B. Dumont Laboratories v. Carroll*, 184 F. 2d 153 (3rd Cir., 1950), cert. den. 340 U. S. 929 (1951). In that case Dumont sued the Pennsylvania State Board of Censors, which by a regulation required that all motion pictures to be shown on television in Pennsylvania be submitted to the Board, for a declaratory judgment that the regulation was invalid. In holding the regulation invalid¹¹ the court concluded that the area of television communication had been fully occupied by Congress under the Communications Act so that the field was no longer open to the states.¹²

We submit that there are no significant differences between the *Dumont* case and that of appellant Permian.

¹¹ *Times Film Corp. v. Chicago*, 365 U. S. 43 (1961), upholding Chicago's ordinance compelling submission of motion pictures for examination prior to their exhibition, should not compel a contrary conclusion. Aside from the area of free speech and press, it is clear that there is no comprehensive federal regulation of the motion picture industry.

¹² It should be noted that the District Court in the *Dumont* case, 86 F. Supp. 813, 816. (E.D. Pa. 1949), concluded that the state regulation in question was invalid not only because of the preemption of the field by Congress, but also because "it would constitute an undue and unreasonable burden on interstate commerce in television broadcasting." We submit that this conclusion is correct.

Both cases, in effect, involve regulation by a state of the content of a broadcaster's program. The regulation in *Dunant* would have compelled the submission of motion pictures for possible censorship, but the injunction in this case already has had the effect of censorship. Moreover, that the censorship in this case may relate to commercial advertising¹³ does not justify any different treatment, for if Congress has preempted the field of regulation of broadcasting, as we believe it has, it clearly has done so just as much in respect of the advertising content of broadcast programs as in respect of other content.

B. Neither the Federal Communications Commission nor the States may exercise the power of censorship over broadcasters.

It is true that the Communications Act does not give unlimited powers to the Federal Communications Commission and that in fact 47 U. S. C. §326 (1958) specifically withholds from the Commission any power "of censorship over radio communications" and provides that "no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." But just as this was thought by the Court of Appeals in the *Dunant* case not to justify Pennsylvania's attempted regulation, so the same result should obtain here. There, in considering this question, the Court of Appeals stated:

"We cannot agree with the contention of the Board of Censors that censorship by the States is permitted under the Act. While Section 326, 47 U.S. C.A. §326, declares it to be a national policy that nothing in the Act shall be understood to give the Federal Commission 'power of censorship' over radio communications and that no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication, this does not mean that the States may exercise a censorship specifically denied to the Federal agency. Censorship may be defined as the forbidding of publication, i.e. prohibition of publication in advance

¹³ Compare *Valentine v. Chrestensen*, 316 U. S. 52 (1942).

of publication. The Act itself demonstrates that Congress was vitally concerned with the nature of the programs broadcast as affecting the public good. It, therefore, dealt directly with the subject matter of the broadcasts which Pennsylvania seeks to regulate here. Congress thus set up a species of 'program control' far broader and more effective than the antique method of censorship which Pennsylvania endeavors to effectuate in the instant case." (184 F. 2d 153, 156).

The foregoing is clear and ample support for the position of appellant Permian that New Mexico's enjoining it from broadcasting Roberts' price advertising represents an unwarranted and invalid incursion by New Mexico into an area fully preempted by Congress by the Communications Act. In this regard, while the *Dumont* case did not expressly articulate all of the three foregoing standards by which preemption may be determined, it is clear that Congress' regulation of broadcasting by the Communications Act meets all three tests of supersession.

C. Congress has provided a comprehensive scheme of regulation of broadcasting under the Communications Act.

As to the first test, namely, whether there is a comprehensive regulation scheme by Congress in the area of broadcasting, the answer must be affirmative. The provisions of the Communications Act of 1934 (herein called the "Communications Act"), 48 Stat. 1064, 47 U. S. C. Secs. 151 et seq. (1958), themselves reveal the comprehensive scope of Congress' regulation of the interstate transmission of radio waves. They represent such a comprehensive occupation of the field of interstate radio communication by Congress as to constitute a complete preemption of the area attempted to be regulated by New Mexico in prohibiting appellant from broadcasting from New Mexico, but in interstate commerce, advertising of a Texas optometrist.

That the Communications Act speaks in general terms is true. Nevertheless, this Court and lower federal courts time and again have emphasized its comprehensive scope.

In *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940), speaking of the Communications Act, this Court stated:

"In its essentials the Communications Act of 1934 derives from the Federal Radio Act of 1927, c. 169, 44 Stat. 1162, as amended, 46 Stat. 844. By this Act Congress, in order to protect the national interest involved in the new and far-reaching science of broadcasting, formulated a unified and comprehensive regulatory system for the industry." (p. 137)

Later, in *National Broadcasting Co. v. U.S.*, 319 U.S. 190 (1943), speaking of the Commission's powers under the Communications Act, the Court stated:

"The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission." (pp. 215-216)

See also *Scripps-Howard Radio v. Federal Communications Commission*, 316 U.S. 4, 6 (1942) ("The Communications Act of 1934 is a hybrid. By that Act Congress established a comprehensive system for the regulation of communication by wire and radio."); *Benanti v. U.S.*, 355 U.S. 96, 104 (1957) ("The Federal Communications Act is a comprehensive scheme for the regulation of interstate communication"); *Allen B. Dumont Laboratories v. Carroll*, 184 F. 2d 153 (3rd Cir., 1950), cert. den. 340 U.S. 929 (1951) ("We think it is clear that Congress has occupied fully the field of television regulation and that that field is no longer open to the States."); *Lamb v. Sutton*, 164 F. Supp. 928,

934 (M.D., Tenn., 1958), aff'd 274 F. 2d 705 (6th Cir., 1960), cert. den. 363 U.S. 830 (1960) ("... Congress under the Federal Communications Act of 1934, as amended, completely occupied and preempted the field of interstate communications in radio and television . . .").

There are, of course, other cases in which this Court has indicated that the regulatory scheme may be less comprehensive than the foregoing quoted statements suggest. In *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940), decided the same term as the *Pottsville* case, *supra*, this Court stated as follows, at page 475:

"But the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel."

The content of this statement, however, is such that it does not detract from the Court's other statements as to the broad scope of the Communications Act. All the Court was there saying, we submit, is that unlike communications by telephone and telegraph, the Act did not give the Commission the power to regulate broadcasters as if they were common carriers and that not having given the Commission such power the Commission, in effect, owed no duty to a licensee to protect it from the adverse effects of economic competition. That broadcasters are not common carriers is clear even from the Act itself, 47 U.S.C. 153 (h) (1958), and this statement is surely compatible with the foregoing statements.

Similarly, in *U.S. v. Radio Corporation of America*, 358 U.S. 334, 350 (1959), the Court stated that "there being no pervasive regulatory scheme, and no rate structures to throw out of balance, sporadic action by federal courts can work no mischief." But there, too, the Court was speaking of the absence of regulation of the character of common

carrier regulation, which absence justified holding that the Federal Communications Commission need not have primary jurisdiction over antitrust matters as they concerned broadcasters.

Overall, in the face of these characterizations¹⁴ of the comprehensiveness of the regulatory scheme of the Communications Act, we submit there is no question but that that regulation is so comprehensive as to preempt the field of broadcast regulation so completely that the action challenged by appellant Permian in this appeal may not stand.

Aside from the fact that the Communications Act forbids censorship by the Commission, past interpretations of the Act attest that the Commission nevertheless has extensive powers with respect to the content of broadcast programs. Under the Act the Commission is responsible for licensing radio broadcasters. In exercising this responsibility the Commission is guided by the standard of whether the "public convenience, interest or necessity will be served" in granting or renewing licenses.

Applying this standard, the Commission has clearly exercised a close supervisory control over broadcast programming, including control over even the advertising content of programs. For example, in *Trinity Methodist Church v. Federal Radio Commission*, 62 F. 2d 850 (D.C. Cir., 1932), cert. den. 284 U.S. 685 (1932), the present Commission's predecessor refused to renew the radio broadcasting license of a licensee who, it was found, had abused it by broadcasting defamatory and untrue matter, on the ground that the station was not being conducted in the public interest, convenience or necessity. Its action was upheld as within its powers, the court rejecting the contention that this sort of supervision constituted censorship. Similarly, in *KFKB Broadcasting Assn. v. Federal Radio Commission*, 47 F. 2d 670 (D.C. Cir., 1931), the court upheld the Commission's refusal to renew a radio station license because the station had been used primarily for broadcasts

¹⁴ The legislative history of the Communications Act and its predecessor acts has been fully considered in the cases already cited, and no useful purpose would be served in further detailing such history at this point.

of what amounted to advertising by Dr. John R. Brinkley. The Commission had found that in effect the station was being operated in the personal interest of Dr. Brinkley and not in the interest of the public.

Later cases have reached similar conclusions. In *Bay State Beacon v. Federal Communications Commission*, 171 F. 2d 826 (D.C. Cir. 1948) the court held that in awarding licenses the Commission could properly consider the amount of time devoted to commercial programs. Similarly, in *Liberty Television, Inc.*, 30 F.C.C. 411 (1961), the Commission expressed its concern as to the advertising content of the programming of an applicant to whom it had denied a license. In doing so it quoted as follows from its *Report and Statement of Policy re En Banc Programming Inquiry* (FCC 60-970), released August 2, 1960: "With respect to advertising material the licensee had the added responsibility to take all reasonable measures to eliminate any false, misleading, or deceptive matters, and to avoid abuses in respect to the total amount of time devoted to advertising continuity as well as the frequency with which regular programs are interrupted for advertising messages."

Nor is the Commission concerned only with quantitative content of programs. For example, in *Capital Broadcasting Co.*, 12 F.C.C. 649 (1948) it considered whether the dissemination of horse racing information was contrary to the public interest, and in *Sam Morris*, 11 F.C.C. 197 (1946) the Commission considered the matter of advertising of intoxicating liquors and concluded that it was a controverted matter of substantial public importance.¹⁵

In view of the foregoing, the conclusion is inescapable that the Commission has such authority over the content, including advertising, of appellant Permian's broadcast programming that New Mexico may not regulate the same

¹⁵ See also, for example, *McGlaskar*, 2 F.C.C. 145, 152-153; *U. S. Broadcasting Corp.*, 2 F.C.C. 208, 217-221; *W.S.B.C. Inc.*, 2 F.C.C. 293, 297; *Oak Leaves Broadcasting Station, Inc.*, 2 F.C.C. 298, 301; *Hammond-Cahmet Broadcasting Corp.*, 2 F.C.C. 321, 325; *May Seed and Nursery Co.*, 2 F.C.C. 559, 571. These cases, all decided between July 1, 1935 and June 30, 1936, vividly portray the Commission's regulation of the matter of the advertising content of broadcasting programs.

content by enjoining appellant from broadcasting particular advertising.

D. The Communications Act is predicated on recognition of the dominant federal interest in radio broadcasting.

As for the second standard for testing supersession, namely, whether there is a dominant federal interest, the Communications Act was passed because the nature of radio broadcasting demanded national regulation. Speaking of this, this Court in *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U. S. 470, 474 (1940), stated:

"The genesis of the Communications Act and the necessity for the adoption of some such regulatory measure is a matter of history. The number of available radio frequencies is limited. The attempt by a broadcaster to use a given frequency in disregard of its prior use by others, thus creating confusion and interference, deprives the public of the full benefit of radio audition. Unless Congress had exercised its power over interstate commerce to bring about allocation of available frequencies and to regulate the employment of transmission equipment the result would have been an impairment of the effective use of these facilities by anyone. The fundamental purpose of Congress in respect of broadcasting was the allocation and regulation of the use of radio frequencies by prohibiting such use except under license."

In view of the nature of radio broadcasting, the federal interest must be dominant to any competing interests of the states. That this is so is even clearer in light of the considerations involved in testing whether the third standard for judging preemption has been met.

E. State regulation of broadcasting involves numerous actual and potential conflicts with federal regulation and must defer to the paramount federal interest.

The third standard suggested by the preemption cases is whether state regulation presents a danger of conflict with federal regulation. One example should suffice to show how real is such danger of conflict in this case.

The Communications Act requires that the Commission "make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." 47 U.S.C. §307 (b) (1958). In making this distribution the Commission must take into account the needs of the various communities and States to be served. See *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 271, 285 (1933; *Simmons v. F.C.C.*, 169 F. 2d 670, 671 (D. C. Cir., 1948), cert. den. 335 U. S. 846 (1948).

In the case of appellant Permian, the Commission has granted it a broadcast license giving it broadcast coverage not only in New Mexico, but also in Texas. It is, then, the undoubted obligation of appellant Permian to serve broadcast listeners in Texas, as well as in New Mexico. Yet, despite the fact that price advertising of eyeglasses is not forbidden by Texas law and that Roberts is an optometrist residing and practicing in Texas, New Mexico has enjoined appellant Permian from broadcasting this advertising to listeners in Texas and New Mexico. By so doing, the State of New Mexico has unjustifiably interfered with its efforts to serve the community and area it was licensed to serve.

Other potential conflicts readily come to mind. Suppose Texas allowed the conduct of certain commercial activities on Sunday but that New Mexico did not. Would New Mexico be justified in prohibiting appellant Permian from advertising such activities, even though in Texas, on the theory, for example, that New Mexico under its police power may regulate what its citizens hear so as not to disturb their needed day of rest? If New Mexico may do so, may not Texas reciprocate, and may not all states do so? The answer must surely be no.

Further, the Communications Act provides that a broadcaster must announce any matter being paid for and also announce the name of the person paying. 47 U. S. C. §317 (1958). Assume that New Mexico prohibited all advertising of optometrists and construed this to restrain communications media from disseminating such advertising.

Assume also a network radio program originating in New York and sponsored by an association of optometrists. If a broadcaster in New Mexico wanted to broadcast the program he would be faced with two alternatives. If he broadcast the program with an announcement that it was paid for by the optometrists' association he would face a charge by New Mexico that he had violated its law. If he broadcast the program without the announcement of who paid for it he would face a charge of violating federal law and, possibly, a denial of renewal of his license for such violation. The dilemma of the broadcaster in such case would be real¹⁶, and the conflict between federal and state regulation of the broadcaster equally real.

In light of the existing conflict between state and federal regulation of Permian's broadcast activities and the potential conflicts to be foreseen, we submit that the state regulation must defer to the paramount interest of federal regulation.

F. The New Mexico Court construed too narrowly the area preempted by the Communications Act and improperly permitted state legislation to impinge on this preempted area.

We do not, as we could not, claim that broadcasters are immune from any state regulation of their business activities. Thus, in *Regents of the University System of Georgia v. Carroll*, 338 U. S. 586 (1950), the Federal Communications Commission renewed the Regents' license only after they repudiated a contract with respondents. The respondent-

¹⁶ It might be suggested that faced with such a dilemma the broadcaster should simply not broadcast the program at all. But compelling a broadcaster not to broadcast a program in order not to violate state law is in fact a species of regulation. Moreover, in *Farmers Union v. W.D.W.*, 360 U. S. 525 (1959), this Court rejected the possibility that a station might refuse to allow any candidate time for broadcasting and thereby avoid the dilemma presented in that case between the mandate under Section 315 of Title 47, U.S.C. that the broadcaster not censor candidate's statements and the danger of libel actions based on what the candidate says. We submit that this possibility should be rejected as a solution to appellant Permian's dilemma also.

ents sued in state court and recovered a judgment against the Regents. This Court held that the judgment did not contravene the Supremacy Clause¹⁷.

In reaching this conclusion this Court relied on its earlier case of *Radio Station WQIE, INC. v. Johnson*, 326 U. S. 120 (1945), which upheld the power of Nebraska to set aside a station transfer for fraud and to order a retransfer of the physical facilities to the transferor, even though the latter might not chose to seek a retransfer of the station-license or the same night, on application for transfer, be denied.

Similarly, in *Kroeger v. Stahl*, 148 F. Supp. 403 (N. J., 1957), aff'd. 248 F. 2d 121 (3rd Cir., 1957), an action by a mobile land radio station operator to compel zoning authorities to cease interfering with his construction of a radio tower in a residentially zoned area, the court held that the zoning ordinance did not unduly interfere with interstate commerce or invade an area preempted from state regulation even though the operator did have a temporary permit from the Federal Communications Commission. Compare *People v. Framer*, 208 Misc. 236, 139 N. Y. S. 2d 331 (1954); *Philadelphia Retail Liquor Dealers Ass'n. v. Pennsylvania Liquor Control Board*, 360 Pa. 269, 62 A. 2d 53 (1948).

The area reserved to the states in regulating broadcasters does not include the area into which New Mexico has now intruded. This incursion, the state court found, was not preempted by the Communications Act. But the State Court considered that the extent of federal occupation of the field far too narrowly:

"With respect to radio broadcasting, Congress has occupied the field by virtue of the Federal Communications Act of 1934. *Regents of New Mexico v. Albuquerque Broadcasting Company*, (CAA 10th Cir.), 158 F. 2d 960. The express underlying purpose of this

¹⁷ United States Constitution, Article VI, Clause 2:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."

Act is to protect the public interest in interstate communication. Section 303 of Title 47, U.S.C.A. gives the Commission authority to suspend the license of any operator who transmits communications containing profane or obscene words, language, or meaning, or false or deceptive signals or communications. Section 1464, Title 18, U.S.C.A. provides for the fining and imprisonment of any person who utters any indecent, obscene or profane language by means of radio communication. These are the federal provisions with which the Pennsylvania statute was in conflict in the case of *Allen B. Dumont Laboratories v. Carroll* (CCA Pa.), 184 F. 2d 153 cited by appellants. We find no such conflict in the case before us. *The Federal Communications Act does not attempt to regulate truthful advertising by radio in interstate commerce.* (emphasis added) (R. 48-49)

We submit that all of the foregoing dispels any notion that the Communications Act is so limited, and any notion that the New Mexico may limit appellant Permian's right to broadcast price advertising of Roberts.

III

New Mexico's enjoining of appellants Head and Permian from disseminating the advertising of Roberts constitutes an unlawful prior restraint upon appellants' publishing and broadcasting; this abridgment is an unlawful denial to them of freedom of the press and constitutes a taking of their property in violation of Section 1 of the Fourteenth Amendment.

Two leading cases on the subject of freedom of the press are *Near v. Minnesota*, 283 U. S. 697 (1931) and *Grosjean v. American Press Co.*, 297 U. S. 233 (1936). In the *Near* case this Court held unconstitutional the enjoining of the publication of a newspaper charging neglect of duty and corruption on the part of officials of Minnesota. Reviewing the history of restraints on publication, the Court concluded that a "previous restraint" such as there attempted con-

stituted an infringement of the liberty¹⁸ of the press guaranteed by the Fourteenth Amendment. 283 U.S. 697, 723.

In the *Grosjean* case the Court held unconstitutional a Louisiana statute imposing a license tax on owners of all newspapers for the privilege of selling or charging for advertisements and measured by a percentage of the gross receipts of such advertisements. The statute by its terms applied only to newspapers with at least a weekly circulation of 20,000 copies. The Court saw in this a deliberate attempt, under the guise of a tax, to limit the circulation of information to which the public is entitled. On the question of previous restraint the Court stated:

"In the light of all that has now been said, it is evident that the restricted rules of the English law in respect of the freedom of the press in force when the Constitution was adopted were never accepted by the American colonists, and that by the First Amendment it was meant to preclude the national government, and by the Fourteenth Amendment to preclude the states, from adopting any form of previous restraint upon printed publications, or their circulation, including that which had theretofore been effected by these two well-known and odious methods." (297 U.S. 233, 249)

A. The injunction constitutes an invalid prior restraint on the dissemination of information.

We submit, that the *Grosjean* and *New* cases are directly applicable to New Mexico's enjoining appellants from disseminating Roberts' price advertising.¹⁹ Appellants have at all times freely admitted that they published and broadcast

¹⁸ Appellants wish to point out that in challenging the action of appellee in the lower court they asserted that enjoining them would deprive them of their "property" without due process of law (R. 4-5, 8, 11, 14-15). Appellants are not attempting to advance at this stage of the proceeding another federal ground not presented to the New Mexico courts. We submit that freedom of the press is as truly a right of property as of liberty and that the matter of characterization should not control appellants' right to raise the issue.

¹⁹ Compare *City of Baltimore v. A. S. Bell Co.*, 218 Md. 273, 145 A. 2d 111 (1958) where, on the basis of the *Grosjean* case, the Maryland Court of Appeals held unconstitutional two Baltimore taxes: one a levy on the gross receipts from the sale of advertising and the other a sales or excise tax on the sales price of such advertising. The court found that in effect most of the tax would fall on newspapers and broadcast media.

Roberts' price advertising. New Mexico did not attempt to punish them for what it conceived to be a violation of Section (67-7-13 N. M. S. A. Rather, just as in *Near v. Minnesota* *supra*, they were enjoined. Just as in *Near*, they now have two choices. They can refrain from disseminating the price information to which New Mexico objects or they can disseminate such information and face citation for contempt of court.

We are aware that in *Lorain Journal v. U. S.*, 342 U. S. 143 (1951), the Court upheld the lower court's enjoining of a newspaper publisher found to have attempted to monopolize interstate commerce in violation of Section 2 of the Sherman Act. In answer to the publisher's contention that the injunction amounted to a prior restraint upon what it may publish, the Court stated:

"We find in it no restriction upon any guaranteed freedom of the press. The injunction applies to a publisher what the law applies to others. The publisher may not accept or deny advertisements in an attempt to monopolize . . . any part of the trade or commerce among the several States. . . . *Associated Press v. United States*, *supra*, at 6-7, 20; *Indiana Farmer's Guide Pub. Co. v. Prairie Farmer Pub. Co.*, 293 U.S. 268. See also, *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 192; *Mabee v. White Plains Pub. Co.*, 327 U.S. 178, 184; *Associated Press v. Labor Board*, 301 U.S. 103. Injunctive relief under 4 of the Sherman Act is as appropriate a means of enforcing the Act against newspapers as it is against others." (at pp. 155-156)

The difference between that case and appellants' case is that in *Lorain Journal* only the use of the injunction was in issue, for it had already been found that the publisher had violated the Sherman Act. The applicability of the Sherman Act to the transactions in question was not in issue, nor was the constitutionality of such applicability. But in appellants' case the very statute under which New Mexico proceeded against appellants is in issue. As that statute has been applied to a transaction exempt from its scope under the commerce clause and upon other grounds, the effect of the injunction is clearly an invalid restraint.

Moreover, in *Lorain* the injunction was not an attempt to tell the publisher what character of advertising it could publish, only with what objective he could publish, or refuse to publish advertising. But in this case the injunction tells appellants that they may not disseminate particular information.

Nor are any of the cases cited in the *Lorain Journal* case in point, for they involve questions of the applicability to publishers and the press of the antitrust, wage and hour and labor laws. Appellants do not claim any exemption from such regulation on the grounds of freedom of the press. They do claim that they may not, consistently with that freedom, be restrained as here attempted.

B. Price advertising may involve an informational as well as a commercial aspect and, as such, should be entitled to Constitutional protection.

We are also aware that the Court has not always extended to the dissemination of commercial advertising the same protection as extended to other information. Thus, in *Valentine v. Chrestensen*, 316 U. S. 52 (1942), the Court held that Chrestensen's efforts to distribute a handbill advertising his submarine were not entitled to Constitutional protection:

"This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising." (at p. 54)

In other cases the Court has held or intimated the same. See *Breard v. City of Alexandria*, 341 U. S. 622, 642-643 (1951); *Murdock v. Pennsylvania*, 319 U. S. 105, 111 (1943). See also *E. F. Drew & Co. v. Federal Trade Commission*, 235 F. 2d 735, 739 (2nd Cir., 1956); *Pollak v. Public Utilities Commission of the Dist. of Col.*, 191 F. 2d 450, 457 (D.C. Cir., 1951), rev'd on other grounds 343 U. S. 451 (1952).

There is no doubt but that the advertising of the price of eyeglasses is commercial in nature. Certainly it is not of the same character as editorial opinion or reportage. Nevertheless, we submit that the foregoing cases are not decisive of the issue. Newspapers and radio stations are able to publish the considerable variety and quantum of news and other material they do publish because the cost of publishing and broadcasting is offset by advertising revenues. This much is implicit in the *Grosjean* case. We submit, therefore, that where, as here, there are involved communications media not purely commercial but disseminating both commercial and non-commercial material, the fact that the particular item in question may be commercial advertising does not foreclose Constitutional protection to otherwise protected rights or sanction that which, if directed towards purely non-commercial matter, would infringe on protected rights.

Moreover, advertisements themselves may be of a more or less commercial nature. For example, in *Hoffman v. Perucci*, 117 F. Supp. 38 (E.D. Pa., 1953) appeal dismissed 222 F. 2d 709 (3rd Cir., 1955), *U. S. ex rel May v. American Mach. Co.*, 116 F. Supp. 160 (E.D. Wash., 1953); *California v. American Automobile Ins. Co.*, 132 C.A. 2d, 317 282 P. 2d 559 (1955), cert. den. 350 U.S. 886 (1955), the courts had before them in contempt proceedings certain advertisements by insurance companies to the effect that awards in accident cases were too high, resulting in higher insurance rates. Quite clearly these advertisements were commercial, having as their objective the lowering of verdicts in insured accident cases. But they were not only commercial. They were also a protest against a condition which the insurance companies considered of serious public concern. As such, they should be entitled to Constitutional protection as much as a newspaper or broadcasting editorial on the same subject.²⁰

Unlike the insurance companies in the foregoing cases price advertising of eyeglasses is not, in explicit terms, an

²⁰ Compare the advertisement in *The New York Times Co. v. L. B. Sullivan*, Docket No. 600, as to which this Court granted certiorari this term. That such advertising is commercial is clear. That it is more than that is equally clear.

expression of opinion. Nevertheless, we submit that no such expression should be necessary in any exact terms. Thus, suppose New Mexico optometrists charged \$150.00 minimum to fit ordinary eyeglasses. Would not Roberts' advertisements in the same trade area that he would fit eyeglasses for \$25.00 be tantamount to an expression that the charge by New Mexico optometrists was too high? We submit that it would be so.

This, of course, is pure speculation, and the record before this Court contains no facts in this regard. We make this argument only to emphasize and to illustrate appellants' belief that they are entitled to protection against the previous restraint imposed on them in this case. In view of the nature of newspaper publication and broadcasting and the reliance on advertising revenues, appellants submit that foreclosing them from disseminating advertising is as odious a restraint under the Fourteenth Amendment as a discriminatory tax.

C. The enjoining of appellants from disseminating price advertising in interstate commerce is an unreasonable and arbitrary exercise of New Mexico's power to regulate intrastate activities and constitutes a denial of Due Process in violation of the Fourteenth Amendment.

Appellants submit that the action of New Mexico deprives them of their property without due process of law and in violation of the Fourteenth Amendment in still another respect. As this Court expressed in *Nebbia v. New York*, 291 U.S. 502, 525 (1934):

"The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means

selected shall have a real and substantial relation to the objects sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts."

Section 67-7-13 N.M.S.A., 1953, as here applied, does not meet this test. New Mexico claims a legitimate interest in protecting its residents' eyesight. But this interest cannot justify its regulation of appellants to the extent that they are precluded from carrying in interstate commerce price advertising of an optometrist resident and practicing in a neighboring state. See also *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *St. Louis Compress Co. v. Arkansas*, 260 U.S. 346 (1922).²¹

IV

New Mexico's preventing appellant Head from publishing price advertising by a Texas optometrist deprives her of her right to engage in interstate commerce and as such deprives her of her privileges and immunities as a citizen of the United States.

Appellant Head, an individual, publishes the Hobbs Flare, which has interstate circulation. She has been prevented from publishing price advertising of an optometrist residing and practicing in Texas. In publishing her paper and Roberts' advertisements, appellant Head clearly was

²¹ Moreover, New Mexico has apparently not sought to enjoin publishers of newspapers and operators of radio stations who may publish and broadcast in Texas and whose circulation and broadcast coverage may include New Mexico from disseminating Roberts' price advertising. The record is silent on this point. To the extent, however, that New Mexico may not have proceeded against any out-of-state media disseminating price information in New Mexico, New Mexico is discriminating against appellants in an unwarranted manner. *Little v. Smith*, 124 Kan. 237, 257 Pac. 959 (1927). Compare *State v. Packer Corp.*, 77 Utah 500, 297 Pac. 1013 (1931) aff'd 285 U. S. 105 (1932).

engaged in interstate commerce. We submit that as a citizen of the United States she has the right to engage in this commerce and New Mexico's interference with this right deprives her of her privileges and immunities as a United States citizen in violation of the Fourteenth amendment.²² As was stated in *Crutcher v. Kentucky*, 141 U.S. 47, 57 (1891), "To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States . . ."

Yet, although no reasonable basis exists for denying her privilege of engaging in such interstate commerce, appellant Head may now engage in such commerce only under the cloud of being found in contempt of the New Mexico District Court by which she has been enjoined. This denial of her rights violates the protections afforded her by Fourteenth Amendment and must fall. Compare *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Edwards v. California*, 314 U.S. 160 (1941).

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of the State of New Mexico should be reversed and the injunction against appellants dissolved and the action dismissed on the merits.

Dated: February 6, 1963

Respectfully submitted,

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²²Appellant Permian is a corporation. As such it is not a "citizen" within the privileges and immunities clause of the Fourteenth Amendment. *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936); *Hague v. C.I.O.*, 307 U.S. 496, 514 (1939).

APPENDIX A

Section 67-7-13. New Mexico Statutes Annotated, 1953 Compilation:

67-7-13. Offenses. Penalties. Each of the following acts on the part of any person shall constitute a misdemeanor and shall be punished by a fine of not less than \$50.00 nor more than \$200.00 or imprisonment in the county jail for not less than 30 days nor more than six (6) months, or both such fine and imprisonment for the first offense, and for a second offense a fine of not less than \$200.00 nor more than \$500.00, or imprisonment in the county jail for not less than 90 days nor more than (1) year, or both such fine and imprisonment. All fines thus received shall be paid into the common school fund of the county in which such conviction takes place.

(a) The practice of optometry, or an attempt to practice optometry without a duly authorized certificate of registration as an optometrist issued by the New Mexico state board of optometry as provided in this act (67-7-1 to 67-7-14), and signed by the president and Secretary of said board.

(b) Permitting any person in one's employ, supervision or control to practice optometry unless that person has a certificate of registration, as provided in this act.

(c) Obtaining, or attempting to obtain, a certificate of registration to practice optometry unless that person has a certificate of registration, as provided in this act.

(d) The making of a willfully false oath or affirmation whenever an oath or affirmation is required by this act.

(e) Falsely impersonating an optometrist of like or different name.

(f) By selling or fraudulently obtaining any optometry diploma, license, record or certificate or aiding or abetting therein.

(g) Using in connection with his name any designation tending to imply that he is a practitioner of optometry, if not the holder of a certificate of registration under the provisions of this act.

(h) Practicing optometry during the time his certificate of registration shall be suspended or revoked.

(i) Either in person or by or through solicitors or agents giving or offering to give to any person eyeglasses, spectacles or lenses, either with or without frames or mountings, as a premium or inducement for any subscription to any book, set of books, magazines, magazine, periodical or other publication, or as a premium or inducement for the purchase of any goods, wares or merchandise.

(j) Except licensed and registered optometrists and licensed and registered physicians and surgeons, having possession of any trial lenses, trial frames, graduated test cards or other appliances or instruments used in the practice of optometry for the purpose of examining the eyes or rendering assistance to anyone who desires to have an examination of the eyes, or selling lenses or duplicating or replacing broken lenses in spectacles or eyeglasses, except upon the prescription of a regularly licensed and registered optometrist or physician and surgeon.

(k) The making of a house to house canvass either in person or through solicitors or associates for the purpose of selling, advertising or soliciting the sale of eyeglasses, spectacles, lenses, frames, mountings, eye examinations or optometrical services.

(l) The peddling of eyeglasses, spectacles or lenses from house to house or on the streets or highways, notwithstanding any law for the licensing of peddlers.

(m) Advertising by any means whatsoever the quotation of any prices or terms on eyeglasses, spectacles, lenses, frames or mountings, or which quotes discount to be offered on eyeglasses, spectacles, lenses, frames or mountings or which quotes 'moderate prices,' 'low prices,' 'lowest prices,' 'guaranteed glasses,' 'satisfaction guaranteed,' or words of similar import.

(n) The violation of any of the provisions of this act for which the penalty has not been elsewhere provided in this act."

APPENDIX B

Relevant sections of the Communications Act of 1934, as amended, Title 47, U. S. C. (1958):

"Sec. 151. Purposes of chapter: Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, there is created a commission to be known as the 'Federal Communications Commission', which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter:"

"Sec. 152. Application of chapter

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided:

(b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier.

"Sec. 153. Definitions

For the purposes of this chapter, unless the context otherwise requires—

(b) 'Radio communication' or 'communication by radio' means the transmission by radio of writing, signs, signals,

pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(e) 'Interstate communication' or 'interstate transmission' means communication or transmission (1) from any State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia,

(h) 'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

"Sec. 301. License for radio communication or transmission of energy

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State;

Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter."

"Sec. 303. Powers and duties of Commission

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

• • •

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

• • •

(h) Have authority to establish areas or zones to be served by any station;

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(j) Have authority to make general rules and regulations requiring stations to keep such records of programs;

transmissions of energy, communications, or signals as it may deem desirable; —

• • •

(4) Have authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to such citizens or nationals of the United States as the Commission finds qualified * * *

(m) (1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee—

(A) has violated any provision of any Act, treaty, or convention binding on the United States, which the Commission is authorized to administer, or any regulation made by the Commission under any such Act, treaty, or convention; or

• • •

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party."

"Sec. 307. Licenses; allocation of facilities; terms; renewals

(a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities

as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years
* * *

"Sec. 317. Announcement of payment for broadcast—Disclosure of person furnishing.

(a) (1) All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person: * * *

"Sec. 326. Censorship

Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

"Sec. 502. Violation of rules, regulations, etc.

Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this chapter, or any rule, regulation, restriction, or condition made or imposed by any international radio or wire communications treaty or convention, or regulations annexed thereto, to which the United States is or may hereafter become a party, shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than \$500 for each and every day during which such offense occurs."

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 392

**AGNES K. HEAD, d/b/a LEA COUNTY PUBLISHING CO.,
AND PERMIAN BASIN RADIO CORPORATION, APPELLANTS**

v.

NEW MEXICO BOARD OF EXAMINERS IN OPTOMETRY

**ON APPEAL FROM THE SUPREME COURT OF THE STATE OF
NEW MEXICO**

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to this Court's order of November 13, 1962¹, inviting the Solicitor General to express the views of the Federal Communications Commission on the issue of possible federal preemption by the Federal Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.* For reasons elaborated below, it is our view that the Communications Act precludes the issuance of an injunction by the New Mexico courts prohibiting broadcasting of certain advertising by appellant radio station.

We shall address ourselves solely to the issue of preemption, as requested by the Court's order, and shall not undertake to discuss the constitutional questions raised by the appellants under the commerce clause and the Fourteenth Amendment.¹ The issue with which we deal relates to appellant Permian Basin Radio Corporation, which operates a radio station, but does not affect the other appellant, Lea County Publishing Co., which publishes a newspaper.

STATEMENT

Permian Basin Radio Corporation (Permian) is the owner of KHOB, a standard broadcast (AM) radio station in Hobbs, New Mexico. Permian operates station KHOB under a license issued by the Federal Communications Commission pursuant to the Federal Communications Act of 1934. This license was renewed for a three-year term in September 1959 and again in September 1962. KHOB's service area comprises portions of southeast New Mexico and west central Texas (R. 39). It regularly provides news coverage of Texas communities and broadcasts advertising for firms located in Texas (R. 27). At issue here is the broadcasting of advertisements for

¹ We note, however, that the question of preemption by the Communications Act is related to the issue whether the state injunction constituted an unconstitutional burden on interstate commerce. The basic contention made by appellants under the commerce clause—the incompatibility of broadcasting with a diversity of state regulations and the consequent necessity of a unified system of federal regulation—supports our conclusion that the Act has preempted the area in question.

a Dr. Roberts, an optometrist in Gaines County, Texas, which quoted prices for the prescription and sale of eyeglasses at his place of business in Texas.

The appellee Board administers the New Mexico statutes pertaining to the practice of optometry, including a provision prohibiting the advertisement either of prices or of discounts for eyeglasses, spectacles, lenses, frames, and mountings. New Mexico Stat. Ann. § 67-7-13. In its complaint in the state district court (R. 1-3), the Board alleged that Roberts placed advertising violating this law with the appellant Permian, as well as with appellant Lea County Publishing Co., the publisher of a New Mexico newspaper, and with KWEW, a second New Mexico radio station. Alleging the absence of any plain, speedy, or adequate remedy at law, the Board sought an injunction prohibiting Roberts from advertising, and the other parties from ~~accepting and~~ publishing such advertising, in New Mexico.

The district court of Lea County, New Mexico, entered the injunctions sought by the Board against Roberts (R. 9-10, 12), and against the radio stations and the newspaper publisher (R. 20-21). On appeal by the New Mexico newspaper and radio stations, the Supreme Court of New Mexico affirmed (R. 43-52). Appellant Permian was enjoined from accepting or publishing within the State of New Mexico advertising of any nature from Roberts which quoted prices or terms on eyeglasses, or which quoted discounts or stated moderate prices, low prices, or words

of similar import prohibited by state law (R. 20-21). The court rejected contentions that the state law had been preempted by federal legislation, ruling that the Federal Communications Act and the Federal Trade Commission Act deal with false advertising but do "not attempt to regulate truthful advertising by radio in interstate commerce" (R. 48-49). It further held that state regulation did not impose an unconstitutional burden on interstate commerce (R. 50-51) and did not deprive the parties of liberty or property in violation of the Fourteenth Amendment or the state constitution (R. 51-52).

ARGUMENT

THE FEDERAL COMMUNICATIONS ACT BARRED THE NEW MEXICO COURTS FROM ISSUING AN INJUNCTION AGAINST THE BROADCASTING OF MATERIAL DEEMED CONTRARY TO THE PUBLIC INTEREST UNDER STATE LAW

INTRODUCTION AND SUMMARY

The New Mexico courts have enjoined the appellant radio station from broadcasting advertising within New Mexico concerning the prices or terms at which eyeglasses may be procured from a Texas optometrist. The sole question to which we address ourselves is whether the Federal Communications Act bars this injunction. We urge that such a prohibition upon the material to be broadcast, based on a state statute which in effect determines that such broadcasting violates the public interest, is preempted by the federal regulatory Act, under well settled principles laid down by this Court.

This Court has held in numerous cases that enactment of a comprehensive and pervasive federal scheme of regulation bespeaks a congressional purpose to occupy the field and exclude state law. The Court has found federal preemption in recent years on this basis in *Campbell v. Hussey*, 368 U.S. 297 (tobacco standards), *San Diego Unions v. Garmon*, 359 U.S. 236 (labor relations), *Pennsylvania v. Nelson*, 350 U.S. 497 (sedition), *Hood & Sons v. Du Mond*, 336 U.S. 525 (milk), and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (grain warehouses). State regulation is also barred when the federal interest is so dominant that the federal statute will be assumed to preclude the enforcement of state law on the same subject. *Pennsylvania v. Nelson*, *supra*, 350 U.S. at 504-510; *Hines v. Davidowitz*, 312 U.S. 52, 66, 73-74.

Where the federal act is construed to preempt a regulatory field, state law is barred whether supplementary or conflicting. *Campbell v. Hussey*, *supra*, 368 U.S. at 302; *Hood & Sons v. Du Mond*, *supra*, 336 U.S. at 542-543. As Mr. Justice Brandeis stated in *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 613, where preemption was inferred from the "broad scope of the authority conferred upon" the Interstate Commerce Commission, further "requirements by the States are precluded however commendable or however different their purpose." Similarly in *Rice v. Santa Fe Elevator Corp.*, *supra*, federal regulatory control of warehousemen was effectuated primarily through standards governing issuance, suspension, or revocation of licenses, while state law

prescribed direct regulation of rates and other practices. The Court stated that the federal scheme "prevails though it is a more modest, less pervasive regulatory plan than that of the State." *Id.* at 236.

Applying these principles, we submit that the Federal Communications Act precludes a state injunction which is in effect based on the State's view of the public interest—prohibiting the broadcast of particular messages. The Act, we believe, has precluded direct regulation by the States of programs and advertisements broadcast by radio stations as shown by (1) the federal provisions for regulation of the content of radio broadcasting in the public interest, and (2) the dominant federal interest in the area. While the Act has no provisions relating to the precise subject of the state regulation, advertising by optometrists or other professional men, the States cannot supplement a federal statute which provides as full regulation as Congress deemed appropriate.

We are not suggesting that Congress, through the Federal Communications Act, has precluded all state action affecting radio broadcasting. It does not appear that Congress intended to bar the States from applying traditional common law remedies to recompense individuals injured by radio broadcasting. For example, we do not believe that Congress, which failed

* For a more complete discussion of the standards to be applied in determining whether federal legislation has barred state regulation, we refer the Court to the government's brief as *amicus curiae* in *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, Nos. 146 and 492, this Term, pp. 33-38, 40-50.

to enact any provision relating to defamation, intended generally to preclude individuals injured by false statements made in a radio broadcast from suing for damages. In addition, we believe that a State may hold an individual accountable under its general criminal laws relating to fraud, albeit the fraud is committed through use of interstate channels of radio communication.

A distinction must be drawn between traditional crimes and torts which are accomplished by means of broadcasting—a matter still largely within state control because of the intentional failure of Congress to enact a supervening code—and so-called public welfare or regulatory statutes which would establish widely divergent standards as to what types of broadcasting are in the public interest. As to the latter area, Congress' purpose was to eliminate confusion and interference with the interstate medium by creating a single source of regulatory authority.²

A. THE FEDERAL COMMUNICATIONS ACT EXCLUSIVELY REGULATES THE CONTENT OF RADIO BROADCASTING, INCLUDING BOTH PROGRAMMING AND ADVERTISING.

1. The Act provides for comprehensive regulation of the content of radio broadcasting.

a. The Commission's general powers under the Act.—Congress initiated the regulation of radio broad-

² The Commission's authority to regulate the use of radio is not exclusive as against other federal agencies. The Commission is, of course, required to exercise its authority with suitable accommodation to provisions of other federal statutes such as the Federal Trade Commission Act, which gives the Federal Trade Commission authority relating to false radio advertising. See 15 U.S.C. 52, 53.

casting by the Radio Act of 1912, which forbade radio broadcasting without a license from the Secretary of Commerce and Labor, allocated frequencies for use of the government, and imposed certain technical restrictions such as the character of wave emissions. 37 Stat. 302. When the number of stations began to multiply, thus interfering with each other's transmissions, the Secretary attempted to regulate this area. The Court of Appeals for the District of Columbia held, however, that, under the Radio Act, the Secretary could not deny a license to a qualified applicant on the ground that the proposed station would interfere with an existing station. *Hoover v. Intercity Radio Co.*, 286 Fed. 1003. The Acting Attorney General ruled in 1926 that the Secretary had no power to regulate the power, frequency, or hours of operation of stations. 35 Ops. Atty. Gen. 126. Stripped of all effective power, the Secretary abandoned his efforts to regulate radio and urged self-regulation. When the situation grew worse, Congress passed the Radio Act of 1927, which created the Federal Radio Commission and endowed it "with wide licensing and regulatory powers." *National Broadcasting Co. v. United States*, 319 U.S. 190, 213. The essential provisions of that statute were reenacted in the Federal Communications Act of 1934 which, as amended, 47 U.S.C. 151, *et seq.*, is the basic federal statute involved in this case.

*The history of federal regulation of broadcasting is described in more detail in the *National Broadcasting Co. case*, 319 U.S. at 210-213.

The Communications Act asserts broad federal authority over all uses of the interstate channels of radio communication. Section 301, 47 U.S.C. 301, declares that it is "the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmissions; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority * * *." The provisions of the Act "apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio; * * * and to the licensing and regulating of all radio stations as hereinafter provided * * *." Section 2(a), 47 U.S.C. 152(a). No person may use any apparatus for the interstate transmission of radio signals except with a license granted under the provisions of the Communications Act. Section 301, 47 U.S.C. 301.

The Act created a special federal agency to effectuate federal regulation. The Federal Communications Commission, the successor to the Federal Radio Commission, was established to regulate "interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of national defense, for the

purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication * * *." Section 1, 47 U.S.C. 151. The Commission's regulatory authority centers around its licensing functions. The Commission may issue or renew a radio station license only if the public interest, convenience, or necessity will be served thereby (Sections 307(a), 307(d), 308(a), and 309(a) of the Communications Act, 47 U.S.C. 307(a), 307(d), 308(a), and 309(a)), and may revoke a license "because of conditions coming to [its] attention * * * which would warrant it in refusing to grant a license or permit on an original application" (Section 312(a)(2), 47 U.S.C. 312(a)(2)). It has authority both to issue cease and desist orders against actions in violation of the Act or its own regulations, or failure to operate in accordance with a license (Section 312(b), 47 U.S.C. 312(b)), and to impose monetary forfeitures on broadcast licensees for wilful violations of the Act, regulations, or Commission orders and for wilful failure to operate according to the license (47 U.S.C. 503). No license may be transferred without the Commission's approval. Section 310(b), 47 U.S.C. 310(b). The Commission also has power to conduct investigations. Section 403, 47 U.S.C. 403.

In addition, Section 303 of the Communications Act, 47 U.S.C. 303, grants to the Commission broad authority to regulate the use of radio as the "public convenience, interest, or necessity requires." On the basis of this criterion, the Commission is empowered, *inter alia*, to: "Classify radio stations"; "[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class"; "[s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest"; and "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act; or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party." Sections 303(a), (b), (g), and (r), 47 U.S.C. 303(a), (b) (g), and (r). See also Section 4(i), 47 U.S.C. 154(i).

It is beyond dispute that Congress intended to set up a broad scheme of national regulation of radio broadcasting. As we have noted, this Court has characterized the predecessor of the present Act, the Radio Act of 1927, as giving the Commission "wide licensing and regulatory powers." *National Broad-*

casting Co. v. United States, 319 U.S. 190, 213. Accord, *Federal Radio Commission v. Nelson Brothers Co.*, 289 U.S. 266, 279, 282, 285; *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137. The Court has likewise made clear that the Federal Communications Act of 1934 gives the Commission "comprehensive power to promote and realize the vast potentialities of radio." *National Broadcasting Co. v. United States*, *supra*, 319 U.S. at 217; accord, *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203, *Allen B. Dumont Laboratories v. Carroll*, 184 F. 2d 153 (C.A. 3), certiorari denied, 340 U.S. 929. The public interest standard gives the Commission extremely broad authority since it means no less than "the interest of the listening public in 'the larger and more effective use of radio.' § 303(g)." *National Broadcasting Co. v. United States*, *supra*, 319 U.S. at 216.

b. The Commission's specific powers with regard to the content of programming and advertising.—We have seen that the Commission has broad general powers. Since, however, we do not contend that the Act has precluded all state action affecting radio broadcasting, these general powers merely provide background to the issue in this case—the extent of the Commission's powers over broadcasting content. We will now show that the Commission has been given extensive authority to regulate programs and advertising material in the public interest.

Under Section 326 of the Act, 47 U.S.C. 326, the Commission has no "power of censorship over the

radio communications or signals transmitted by any radio station," and it may not promulgate or fix any regulation or condition "which shall interfere with the right of free speech by means of radio communications." However, Section 303(j), 47 U.S.C. 303(j), provides that the Commission may "make general rules and regulations requiring stations to keep such records of programs * * * as it may deem desirable." In determining whether the issuance, renewal, or revocation of a license will serve the public interest under Sections 307 (a), (d), 308(a), 309(a), and 312 of the Act, 47 U.S.C. 307 (a), (d), 308(a), 309(a), and 312, the Commission has authority to consider proposed and past programming, as well as programming policies.⁵ Thus, in *Federal Radio Commission v. Nelson Brothers Co.*, *supra*, 289 U.S. at 285, the Court stated that, in granting licenses, the public interest standard required consideration of "the scope, character and quality of services" to be rendered. Similarly, in *National Broadcasting Co. v. United States*, *supra*, 319 U.S. at 215-216, in upholding the chain broadcasting regulations relating to the grant of licenses, the Court declared: "The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. * * * It puts upon the Commission the burden of determining the composition of that traffic." Accord, *Regents v. Carroll*,

⁵ The uttering of "any obscene, indecent, or profane language" by radio, and the transmission of knowingly false or deceptive communications are federal offenses. 18 U.S.C. 1343, 1464; 47 U.S.C. 509.

338 U.S. 586, 598; *KFKB Broadcasting Ass'n v. Federal Radio Commission*, 47 F. 2d 670, 672 (C.A. D.C.); *Trinity Methodist Church, South v. Federal Radio Commission*, 62 F. 2d 850 (C.A. D.C.), certiorari denied, 284 U.S. 685, 288 U.S. 599; *Simmons v. Federal Communications Commission*, 169 F. 2d 670, 671-672 (C.A. D.C.), certiorari denied, 335 U.S. 846.⁶ The courts have reasoned that the denial of a license upon a ground reasonably related to the public interest is neither censorship nor an abridgement of the right of free speech (*National Broadcasting Co. v. United States*, 319 U.S. 190, 226),⁷ and that "comparative service to the listening public is the vital element; and programs are the essence of that service". (*Johnston Broadcasting Co. v. Federal Communications Commission*, 175 F. 2d 351, 359 (C.A. D.C.)); see *Simmons v. Federal Communications Commission*, 169 F. 2d 670 (C.A. D.C.), certiorari denied, 335 U.S. 846;

⁶ See also *Great Lakes Broadcasting Co. v. Federal Communications Commission*, 289 F. 2d 754, 755 (C.A. D.C.); *Henry v. Federal Communications Commission*, 302 F. 2d 191 (C.A. D.C.), certiorari denied, 371 U.S. 821; *Noe v. Federal Communications Commission*, 260 F. 2d 739, 743 (C.A. D.C.), certiorari denied, 359 U.S. 924; 75 Cong. Rec. 3682.

⁷ Since advertising, although not wholly beyond the First Amendment, enjoys less protection than other speech (see *Murdock v. Pennsylvania*, 319 U.S. 105, 110-111; *Valentine v. Chrestensen*, 316 U.S. 52, 54; *Martin v. Struthers*, 319 U.S. 141, 142, note 1; *Breard v. Alexandria*, 341 U.S. 622, 641-643), the Commission's power to regulate advertising by radio may, indeed, be broader than it is with respect to other programming. Cf. *Farmers Union v. WDAY*, 360 U.S. 525, 529-530 (political broadcasts); *Henry v. Federal Communications Commission*, 302 F. 2d 191, 194 (C.A. D.C.), certiorari denied, 371 U.S. 821 (entertainment).

Bay State Beacon, Inc. v. Federal Communications Commission, 171 F. 2d 826, 827 (C.A. D.C.)).

If programming is a proper consideration "in individual cases, there is no reason why it may not be stated in advance by the Commission in interpretative regulations defining the prohibited conduct with greater clarity." *Federal Communications Commission v. American Broadcasting Co.*, 347 U.S. 284, 289-290, note 7. Cf. *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203. Such regulations would require accommodation of the Commission's authority and of the statutory and constitutional guarantees of free speech. The Commission has not in fact issued general regulations on the subject. Consequently, the precise limits of the Commission's authority, as it may be exercised through rule making or by action on individual license applications, are not definitively established.

There is, however, no question that the Commission has asserted considerable authority to regulate programming, including advertising, in the public interest. For example, in *WREC Broadcasting Service*, 10 Pike & Fischer, Radio Regulation 1323, 1358 (1955), the Commission sustained an examiner's conclusion that an applicant in a comparative proceeding, who accepted so-called "bait and switch" advertising, "avoided its proper responsibility as a broadcaster in failing to exercise more care in accepting advertising." It stated (*id.* at 1358-1359):

We agree with the Examiner's conclusion. A broadcasting station is not without responsibility with respect to the advertising it carries.

It may not, in the proper discharge of its licensee responsibility adopt a general attitude of "accepting in good faith all advertising offered," particularly when, as here, advertising has been called specifically to its attention.

See also, e.g., Public Notice issued on February 21, 1957, on deceptive or misleading advertising (14 Pike & Fischer, Radio Regulation 1262); Public Notice issued on March 9, 1962, on double billing practices (23 Pike & Fischer, Radio Regulation 175); *Knickerbocker Broadcasting Co., Inc.*; 2 F.C.C. 76, 77 (advertising of birth control products deemed to be "offensive and contrary to the public interest").

More particularly, with direct relevance to the issues in this case, the Commission has repeatedly directed itself to advertising which bears upon public health and safety. Thus, the Federal Radio Commission denied a renewal of a license to a station which broadcast a "medical question box" devoted to diagnosing and prescribing treatment of illnesses from symptoms given in letters from listeners, and which received a rebate on each prescription sold. *KFKB Broadcasting Ass'n v. Federal Radio Commission*, 47 F. 2d 670, 671 (C.A. D.C.). The Radio Commission held, with judicial approval, that "the practice of a physician's prescribing treatment for a patient whom he has never seen, and bases his diagnosis upon what symptoms may be recited by the patient in a letter addressed to him, is inimical to the public health and safety, and for that reason is not in the public interest." *Id.* at 671-672. The Communications Commission has similarly condemned advertising of alleged

medical prescriptions and quack remedies, which were deemed inimical to health, and granted renewal only upon assurances that such broadcasting would be discontinued. *Farmers and Bankers Life Insurance Co.*, 2 F.C.C. 455, 457-459. The Commission stated that "[a] broadcast station, carrying such programs should be held to a high degree of responsibility, affecting as they may the health and welfare of the listeners, and careful investigation of such products, and of the claims made therefor, should be made before they are advertised over a broadcast station." 2 F.C.C. at 458. See also *WSBC, Inc.*, 2 F.C.C. 293, 294-296, and *Oak Leaves Broadcasting Station, Inc.*, 2 F.C.C. 298 (both involving advertising of quack medicines by one not licensed to practice medicine).

The Commission has likewise determined that a broadcaster's duty to ascertain and meet local programming needs may include an obligation, in accepting advertising, to respect local laws relating to health, safety, and morals. By a letter dated August 15, 1949, to the Chairman of the Senate Committee on Interstate and Foreign Commerce, the Commission stated its position on broadcasting advertisements for alcoholic beverages contrary to local law (5 Pike & Fischer, Radio Regulation 593, 594):

In those localities and states where the sale of alcoholic beverages is prohibited by local or

* See also Opinions of the General Counsel, Federal Radio Commission, August 1, 1928-August 1, 1929, Opinion No. 32, pp. 77-82, and Hearings before Senate Committee on Interstate Commerce, 71st Cong., 1st and 2d Sess. on S. 6, pp. 87-89 (both involving advertising of cigarettes).

state statutes, such advertising by radio in those areas would, of course, not be in the public interest, since adherence to the laws of the state in which a station is located, especially laws expressive of the public policy of the state or locality on subjects relative to health, safety, and morals, is an important aspect of operation in the public interest. Obviously, the same is true with respect to those areas where advertising of alcoholic beverages is prohibited by law.

This policy is consistent with the statement of this Court that the public interest "standard for the issuance of licenses would seem to imply a requirement that the applicant be law-abiding." *Federal Communications Commission v. American Broadcasting Co.*, 347 U.S. 284, 289-290, note 7.

The Commission has recently reviewed the question of programming in a Policy Statement issued on July 29, 1960. *Report and Statement of Policy Re: Commission En Banc Programming Inquiry* [hereafter referred to as "Programming Policy Statement"] (20 Pike & Fischer, Radio Regulation 1901). Recognizing that its licensing and general regulatory functions are limited by the First Amendment and by Section 326 of the Communications Act, the Commission stated that it could "not condition the grant, denial or revocation of a broadcast license upon its own subjective determination of what is or is not a good program." *Id.* at 1906-1907. However it pointed to the "fact that a broadcaster is required to program his station in the public interest" and as-

serted authority to review the exercise of this responsibility. *Id.* at 1909. Consequently, the Commission generally defined the programming duties of the licensee (*Id.* at 1912):

The confines of the licensee's duty are set by the general standard "the public interest, convenience or necessity." The initial and principal execution of that standard, in terms of the area he is licensed to serve, is the obligation of the licensee. The principal ingredient of such obligation consists of a diligent, positive and continuing effort by the licensee to discover and fulfill the tastes, needs and desires of his service area. If he has accomplished this, he has met his public responsibility. It is the duty of the Commission, in the first instance, to select persons as licensees who meet the qualifications laid down in the Act, and on a continuing basis to review the operations of such licensees from time to time to provide reasonable assurance to the public that the broadcast service it receives is such as its direct and justifiable interest requires.

The Commission also made clear that the licensee's duty to program in the public interest extends to advertising material. It stated (Programming Policy Statement, 20 Pike & Fischer, Radio Regulation 1912-1913):

Broadcasting licensees must assume responsibility for all material which is broadcast through their facilities. This includes all programs and advertising material which they present to the public. With respect to adver-

tising material the licensee has the additional responsibility to take all reasonable measures to eliminate any false, misleading, or deceptive matter and to avoid abuses with respect to the total amount of time devoted to advertising continuity as well as the frequency with which regular programs are interrupted for advertising messages. This duty is personal to the licensee and may not be delegated. He is obligated to bring his positive responsibility affirmatively to bear upon all who have a hand in providing broadcast matter for transmission through his facilities so as to assure the discharge of his duty to provide acceptable program schedule consonant with operating in the public interest in his community. The broadcaster is obligated to make a positive, diligent and continuing effort, in good faith, to determine the tastes, needs and desires of the public in his community and to provide programming to meet those needs and interests. This again, is a duty personal to the licensee and may not be avoided by delegation of the responsibility to others.*

The Commission's concept of its responsibilities in the field of radio advertising accords with the views

* Recognizing that the "particular manner in which applicants are required to depict their proposed or past broadcast policies and services (including the broadcasting of commercial announcements), may therefore, have significant bearing upon the Commission's ability to discharge its statutory duties in the matter," the Commission had previously initiated proceedings (Docket No. 12673) on November 24, 1958, to make revisions to its rules prescribing the form and content of reports on broadcast programming. 23 Fed. Reg. 9298. Programming Policy Statement, 20 Pike & Fisher, Radio Regulation 1916.

expressed by Attorney General Rogers in a report submitted to the President on December 30, 1959. The Attorney General stated (Report by the Attorney General on Deceptive Practices in Broadcasting Media, 19 Pike & Fischer, Radio Regulation 1901, 1920) :

* * * a review of existing authority indicates that the Commission may, without running afoul of constitutional or statutory safeguards of freedom of speech, give considerable weight to advertising practices and programming in the context of licensing, rule making or investigative proceedings. It is true that the statutory provision relating to censorship and the First Amendment delineate the outer limits of the Commission's powers. Yet, within those limits considerable scope is left for effective regulatory action. This would certainly be so with respect to deceptive practices as opposed to problems of taste.¹⁰

¹⁰ In the 1960 amendments to the Communications Act, 74 Stat. 889, Congress enlarged the Commission's powers to deal with certain deceptive practices in contests of intellectual knowledge or skill, by adding Sections 503(b) and 509, 47 U.S.C. (Supp. II) 503(b) and 509. These amendments were occasioned by the fact that the then-existing regulatory authority of the Commission "over deceptive broadcast practices does not extend beyond its broadcast licensees and the Commission cannot reach networks directly or advertisers, producers, sponsors, and others who in one capacity or another are associated with the presentation of a radio or television program which may deceive the listening or viewing public." S. Rep. No. 1857, 86th Cong., 2d Sess., p. 6; H. Rep. No. 1800, 86th Cong., 2d Sess., pp. 25-26. That Congress has legislated specifically concerning this aspect of programming does not mean that specific authorization is required for the Commission's consid-

In summary, the Federal Communications Act gives the Commission broad powers over radio broadcasting generally. More particularly, the Act gives the Commission authority to regulate programming, including advertising, to the extent compatible with "this country's tradition of free expression," in order to determine whether it is consistent with the public interest. *Farmers Union v. WDAY*, 360 U.S. 525, 529-530. The determination of what programming, including advertising, serves the public interest is clearly not a "merely peripheral concern" (see *San Diego Unions v. Garmon*, 359 U.S. 236, 243) of the Communications Act, so that it might be said that no preemption was intended. Construing the federal regulatory scheme, the Third Circuit has held that the Communications Act preempted the regulation of programming and barred state censorship of the broadcasting of motion pictures over television (*Allen B. Dumont Laboratories v. Carroll*, 184 F. 2d 153, 156, certiorari denied, 340 U.S. 929):

The Act itself demonstrates that Congress was vitally concerned with the nature of the programs broadcast as affecting the public good. It, therefore, dealt directly with the subject matter of the broadcasts which Pennsylvania seeks to regulate here. * * * Program control was entrusted to the Federal Commission and it is an effective one. * * * We think it is clear that Congress has occupied fully the field of television regulation and that that field is no longer open to the States.

eration of programming in the exercise of its general licensing and regulatory authority over broadcast licensees. Cf. *National Broadcasting Co. v. United States*, 319 U.S. 190, 219; *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203.

Similarly, we submit, the authority conferred on the Commission with regard to radio advertising precludes the States from regulating advertising pursuant to their inevitably divergent views of the public interest.

2. *The Act's regulation of the content of radio broadcasting reflects the dominant federal interest in this subject*

We have noted above (pp. 7-8) that the Radio Act of 1927 was passed because of the chaos resulting from the unregulated use of radio. As this Court described the situation (*National Broadcasting Co. v. United States*, 319 U.S. 190, 212):

[N]ew stations used any frequencies they desired, regardless of the interference thereby caused to others. Existing stations changed to other frequencies and increased their power and hours of operation at will. The result was confusion and chaos. With everybody on the air, nobody could be heard.

The solution to this problem was necessarily federal, rather than state, regulation. The allocation of channels and limitations on their use could not be controlled by the States. Radio transmission crosses state lines and, if each State could have provided its own variety of regulation, the consequence of 48 different regulatory schemes would almost certainly have been continuation of much of the existing chaos. See *Federal Radio Commission v. Nelson Brothers Co.*, 289 U.S. 266, 279. Thus, the federal interest in the technical regulation of radio broadcasting was plainly dominant.

We submit that the dominant federal interest in uniform regulation of the content of radio broadcasting is equally apparent. From the outset, control and regulation of the content of broadcasting, as well as its technical aspects, have been within the province of the federal government. See *National Broadcasting Co. v. United States*, *supra*, 319 U.S. at 210-216; see also *supra*, pp. 12-23. While the immediate problem which gave rise to the Radio Act was the physical one of interference, the allocation of a limited number of radio channels necessarily led to the question of content. As this Court stated in the *National Broadcasting Co.* case (319 U.S. at 216):

* * * [The Act] puts upon the Commission the burden of determining the composition of [radio] traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply.

Uniform national regulation of the content of radio broadcasting is as necessary as uniform regulation of radio transmission itself. Unlike the dissemination of printed matter, radio broadcasting cannot be altered or limited when crossing state lines. Local restraints on the matter broadcast will necessarily affect the use of radio frequencies both within and without the regulating State because radio stations normally serve interstate audiences.¹¹ If each State within range of a broadcast signal sought to assert jurisdic-

¹¹ Since even intrastate use of radio affects interstate and foreign radio communication, it is also subject to federal regulation. Section 301 of the Act, 47 U.S.C. 301.

tion, the station could be subjected to a jumble of directives. For example, in this case, Permian's service area encompasses portions of New Mexico and Texas, and Texas does not impose restrictions on advertising by optometrists. The station could seek to comply with the more severe state law (here, New Mexico), but that means that New Mexico law is then limiting the service to Texas residents by a station licensed by the Communications Commission to serve both New Mexico and Texas. Moreover, in the event of conflict between New Mexico and Texas statutes, even the solution of following the more restrictive regulation might be impossible. If state authority could be limited to those States in which the station "does business" in traditional terms, *i.e.*, where it has a place of business, transmitter, or other facilities, the conflicts might be somewhat minimized. But this approach is wholly unacceptable for it would make the power to control the content of programming and advertising depend upon purely fortuitous factors (*e.g.*, the locations of transmitters), rather than upon a recognition of the real interests involved.

Even more striking is the situation which exists when an advertiser broadcasts over a network, rather than over a single station. If the injunction below were upheld, no radio station could carry an advertisement contrary to the policy of the State where the station happened to be located. The same would hold true of program content. If nationwide broadcasting were to become subject to regulation of this kind in fifty States, the mischief and confusion would

be incalculable. At the least, it may be said that multi-state broadcasting would be seriously inhibited.

The possibility of conflict between States is particularly acute because of the large number of state statutes regulating advertising. As an example, New Mexico has, in addition to the statute involved here, laws prohibiting any person to advertise (1) any article by stating that the sales tax is not included in the price advertised; (2) second-hand watches, without stating this fact; and (3) any article as to which there is a limitation on the number of items to be sold at the advertised price. N.M. Stat. Ann. §§ 72-16-7, 40-21-30, 49-1-5. Texas, on the other hand, has none of these provisions, but has other statutes prohibiting certain kinds of advertising. If one looks at the matter on a nationwide basis—as one would be obliged to do in the case of a network program—there is a veritable maze of provisions with which to reckon. If they apply to radio advertising, the result will clearly be serious interference with the uniform regulation of the content of radio broadcasting under the Communications Act.

Such consequences give rise to a serious question whether state regulation of programming, including advertising, in interstate broadcasting is an undue burden on interstate commerce, in violation of the commerce clause.¹² The power of the States to regu-

¹² The government's views concerning the general standards to be applied under the commerce clause are discussed in its brief as *amicus curiae* in *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, Nos. 146 and 492, this Term, pp. 17-32.

late matters of local state concern and to adopt measures in some measure affecting interstate commerce does not extend, even in the absence of federal legislation, to state regulation which would "materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern." *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 770. See also *Bibb v. Navajo Freight Lines*, 359 U.S. 520; *Morgan v. Virginia*, 328 U.S. 373, 377-379. Here, where Congress has legislated, the same factors surely demonstrate that regulatory activity by the States is preempted by the federal law.

B. THE STATE COURT'S INJUNCTION INTRUDES UPON THE FEDERAL SCHEME

In light of the considerations elaborated above, we submit that the state court's injunction cannot stand. A New Mexico statute made it a criminal offense to publish advertising which "by any means whatsoever [quotes] any prices or terms on eyeglasses, spectacles, lenses, frames or mountings, or which quotes discounts to be offered on eyeglasses, spectacles, lenses, frames or mountings or which quotes 'moderate prices,' 'low prices,' 'lowest prices,' 'guaranteed glasses,' 'satisfaction guaranteed,' or words of similar import." N. M. Stat. Ann. § 67-7-13. On the basis of this provision, the New Mexico court has enjoined the broadcasting of particular advertising material on the theory that it is contrary to the public interest as declared in state law. This, we contend, is a direct attempt to regulate a field preempted by the federal

government. If we are correct, it follows that the injunction is invalid under the supremacy clause of the Constitution. Article VI. clause 2.

We fully recognize, as this Court has held, that the States may exercise their police power to regulate optometry and other professions in the public interest, including the placement of advertising by members of such professions. *Williamson v. Lee Optical Co.*, 348 U.S. 483; *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608. The fact that a prohibition forbidding optometrists to advertise, or to advertise in certain ways, might incidentally affect the advertising revenues of radio stations should not affect the validity of the state regulations. On the other hand, there is nothing in those cases dealing with the power of the States to regulate a radio station. The Oregon statute involved in the *Semler* case merely provided for revocation of the offending dentist's license; and the Oklahoma statute in *Williamson* restricted advertising by opticians only, and had a specific proviso to the effect that it did not render any newspaper or other advertising media liable for publishing any advertising furnished them by a vendor. 348 U.S. at 488, note 2.

Direct regulation of interstate broadcasting is a different matter. The New Mexico statute makes radio stations, in addition to optometrists, subject to criminal penalties and injunctions against advertising. The New Mexico courts issued an injunction against the station in this case. Thus, this case involves a direct assertion of state power to regulate the use of radio frequencies to prevent an advertisement by a Texas optometrist upon New Mexico's

determination that the broadcast of such advertising is contrary to the public interest. The fact that the state regulation goes only to particular kinds of advertising does not lessen the conflict with federal authority. While New Mexico sought to regulate the use of radio channels only in order to facilitate its primary and proper concern with the regulation of optometrists, "[c]ontrolling and therefore superseding federal power cannot be curtailed by the State even though the ground of intervention be different than that on which federal supremacy has been exercised." *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 480; see *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605.

The distinction between the regulation of optometrists and radio stations is of great practical significance. In this case, the optometrist was a resident of Texas, having no place of business in New Mexico, and was therefore not subject to the regulations of New Mexico. Even though the optometrist was not disobeying Texas law, New Mexico would not allow the radio station to broadcast his message to prospective customers in Texas and New Mexico. Situations in which the radio station is in a different State from the advertiser are common, since most radio broadcasting crosses state lines (see *supra*, pp. 24-26).

We also agree that the Communications Act does not broadly withdraw from the States the power to redress private wrongs. The fact that the radio portions of the Act have no remedial provisions for private persons is strong evidence that Congress intended no preemption in this area. Moreover, the

likelihood of conflict with any federal policy is remote. State law may therefore properly be applied, even though licensed facilities are involved, to adjudicate rights under a contract to purchase stock in a broadcasting station (*Regents v. Carroll*, 338 U.S. 586, 600, 602), a lease of the property utilized by a station (*Radio Station WOW v. Johnson*, 326 U.S. 120, 131-132), or a contract for exclusive personal services. Similarly, we believe that a State may make its ordinary remedies available to one defamed, albeit the offending publication was over the air waves, unless this would clearly conflict with federal policy. See *Farmers Union v. WDAY*, 360 U.S. 525.

Nor is it necessary to argue that a State may not enforce its traditional criminal laws when the offense is perpetrated by means of radio broadcasting. We assume, for example, that a State may be permitted to prosecute for fraud resulting from radio broadcasts. The legislative history of the 1952 amendment to the Communications Act, making it a federal crime to use broadcasting facilities to defraud (18 U.S.C. 1343), indicates that neither the original Communications Act nor the amendment was intended to displace state criminal jurisdiction; the amendment was apparently designed to cover the area of interstate crime where state authority may be insufficient. See H. Rep. No. 388, 82d Cong., 1st Sess., pp. 2-3. The absence of any comprehensive federal criminal code for radio broadcasting also strongly suggests that the States retain their ordinary criminal jurisdiction. Cf. *Pan American World Airways Inc. v. United*

States, Nos. 23 and 47, this Term, decided January 14, 1963.

The fact that Congress, in providing for the regulation of radio broadcasting, saw no need to write its own code to deal with traditional crimes covered by state law (*e.g.*, fraud) and traditional wrongs or torts for which the States uniformly provide a remedy (*e.g.*, defamation) does not lead to the conclusion that the States may apply the same sanctions as regulatory measures.¹³ It is clear that the States have not been left free to develop their own divergent notions of what types of radio advertising and broadcasting are most likely to promote the public interest.

The line between (a) presumably permissible state enforcement of ordinary criminal and civil liability in a way that incidentally affects broadcasts and (b) the forbidden direct and substantial state regulation of interstate broadcasts no doubt depends more upon an appraisal of specific incidents than upon any single factor or rule of thumb. In most cases, the following considerations would seem most relevant.

(1) Does the state law express a judgment concerning the content of public communications, whether business communications or not, or is the circumstance that mass communications are involved more

¹³ We emphasize, however, that we are not suggesting that the determinations of state courts awarding damages or imposing criminal penalties for traditional wrongs are never preempted. In particular situations, they may be precluded or modified to the extent necessary to reach a fair accommodation with the federal authority. See *Farmers Union v. WDAY*, 360 U.S. 525; *Radio Station WOW v. Johnson*, 326 U.S. 120, 132.

or less involved irrelevant? If the former, as here, the application of the state law is the more likely to be preempted.

(2) There is a familiar line between traditional crimes (or torts) and those crimes (or wrongs) which are defined by so-called public welfare measures. As Professor Sayre has observed (*Public Welfare Offenses*, 33 Colum. L. Rev. 55, 67), there are "two pronounced movements which mark twentieth century criminal administration, *i.e.*, (1) the shift of emphasis from the protection of individual interests which marked nineteenth century criminal administration to the protection of public and social interests, and (2) the growing utilization of the criminal law machinery to enforce, not only the true crimes of the classic law, but also a new type of twentieth century regulatory measure involving no moral delinquency." Social and economic legislation is based on the various States particular views of the public interest and therefore creates a greater degree of risk of the very kind of interstate confusion which the federal regulation was designed to prevent.

(3) Does the State take hold of the conduct in advance or merely hold the broadcaster responsible for the content of his message? Obviously, the prior restraint creates a greater danger of interference with interstate programming.

(4) Is the State attempting to deal with matters exclusively of local concern or to reach beyond its borders in a way that affects citizens of other States and interstate commerce?

The practical differences resulting from these lines of analysis are best expressed in illustrations. If a radio disc jockey uses his broadcast time to issue signals or messages to persons engaged in a criminal conspiracy, no one would suggest that it interfered with the freedom of broadcasting or with the scheme of federal regulation for a State to indict him for crime. The same may be said of a broadcasting sponsor who fraudulently induces listeners to invest their money in Florida lots which are known to be valueless and to lie under three feet of water. Again, there is no interference with federal regulation if a State permits one of its citizens who has been defamed over the airwaves to sue the responsible parties for the slander.

Consider, by way of contrast, the following situations in which the application of State law would seem to interfere with the federal scheme. State "A" says that it does not regard the advertising of beer to be in the public interest and undertakes to prohibit it. May it forbid radio stations which operate within the State or which beam signals into the State from carrying such advertising? State "B" has a so-called "fair trade law." May it implement that law by forbidding or punishing radio advertising which announces that "fair-traded" commodities may be purchased in an adjoining State (which has no prohibition upon competitive pricing) at prices below the fair-traded figure? State "C" concludes that certain motion pictures which it classifies as not suitable for children may be shown in its motion picture

theaters to adults only. May it extend that regulation so as to forbid also the showing of these motion pictures by television broadcasters during daylight hours?

We do not urge that this Court need now decide a great variety of cases not currently before it. Our point is this: Congress' failure to deal with traditional crimes and wrongs accomplished by means of broadcasting may well permit the inference that it did not intend to create a vacuum and that the States may provide their traditional remedies; it is quite another matter to suggest that the States may apply regulatory measures which are either directed at radio broadcasting as such or which, even though they are of more general application, will cause direct and substantial interference with this interstate medium of communication because they will result in a wide diversity of rules and standards governing the matter of permissible program content.

Turning to the instant case, we note, at the outset, that the injunction here involved constitutes a direct regulation of broadcasting and a prior restraint upon it. Beyond this, it makes a determination of public interest which is at variance with the view of the public interest which is held by other States. Texas does not regard it as contrary to the public interest for optometrists to advise customers concerning the prices at which eyeglasses can be purchased. Yet New Mexico's law would inhibit the efforts of Texas optometrists to communicate with listeners—listeners

located in Texas as well as in New Mexico. It is undisputed, we take it, that the States may not undertake to license radio stations, to resolve problems of electrical interference between stations, to prohibit all advertising by radio stations, or to censor programming. *Allen B. Dumont Laboratories v. Carroll*, 184 F. 2d 153 (C.A. 3), certiorari denied, 340 U.S. 929; *RCA Communications v. Patchogue Broadcasting Co., Inc.* (19 Pike & Fischer, Radio Regulation 2071, N.Y. S.C., Suffolk County, March 25, 1960). Similarly, we submit, New Mexico may not determine what advertising is not in the public interest and may not be broadcast.

It may be contended that the Communications Act does not deal with the problem of professional advertising by radio or give the Commission power to prohibit the broadcasting of specific advertisements which it considers unethical. However, as we have noted above (pp. 5-6), once federal preemption is established, state law may not supplement the federal scheme any more than it may transgress it. *Campbell v. Hussey*, 368 U.S. 297, 302. Furthermore, such limitations as there are upon the power of the Communications Commission in the matter of regulating program content reflect a decision by Congress that administrative intervention should be limited, not a decision that fifty other sovereigns should be free to intervene. Cf. *Pennsylvania v. Nelson*, 350 U.S. 497, 504; *Allen B. Dumont Laboratories v. Carroll*, *supra*, 184 F. 2d at 156.

In addition, the federal Act does provide a remedy

for the interests asserted by New Mexico. Permian's license was renewed in 1959 and again in 1962, two years after the complaint below was filed. On each occasion, the Commission had before it the statutory issue whether the past and proposed broadcast operations of Permian, including its advertising, were in the public interest, and the Commission implicitly made the statutory determination—required by Sections 307(d), 308(a), and 309(a) of the Communications Act, 47 U.S.C. 307(d), 308(a), 309(a)—that Permian met this standard.

We have seen (pp. 16-17) that the Commission has in fact considered, in license renewal proceedings, whether a station's advertising is consistent with the public health and safety—which, presumably, are the objectives to which the New Mexico statute is addressed. Likewise, the Commission has considered whether a station has accepted advertising in violation of state law (see *supra*, pp. 17-18). The State of New Mexico could have filed a petition in the renewal proceeding, pursuant to Section 309(d)(1) of the Communications Act, 47 U.S.C. (Supp. II) 309(d)(1), to deny the renewal application on the ground that Permian's advertising violated state law and was contrary to the public interest. The State of Texas could also have intervened in any such proceeding to protect its interests. Section 309(e), 47 U.S.C. (Supp. II) 309(e). If the Commission had agreed with New Mexico's position, it could have declined to renew

Permian's license unless the station ceased broadcasting the offending advertising. And if the Commission disagreed with New Mexico, the latter could have obtained review of any adverse Commission decision pursuant to Section 402(b) of the Communications Act, 47 U.S.C. 402(b), in the United States Court of Appeals for the District of Columbia Circuit.

The New Mexico injunction has the effect of bypassing the federal regulatory scheme altogether. "The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or an application of the federal Board, precludes state courts from doing so" and the "reasons for excluding state administrative bodies from assuming control of matters expressly placed within the competence of the federal Board also exclude state courts from like action." *Garner v. Teamsters Union*, 346 U.S. 485, 491. There is nothing here to suggest that the federal remedy was inadequate or that the activity enjoined so imminently threatened public safety as to call for extraordinary measures by the State.

CONCLUSION

For the foregoing reasons, we respectfully submit that judgment with regard to appellant Permian should be reversed.

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OCTOBER TERM, 1962

No. 392

AGNES K. HEAD, d/b/a LEA COUNTY PUBLISHING Co.,
AND PERMIAN BASIN RADIO CORPORATION, *Appellants*

v.

NEW MEXICO BOARD OF EXAMINERS IN OPTOMETRY

On Appeal From The Supreme Court of the State of
New Mexico

MOTION OF THE AMERICAN OPTOMETRIC ASSOCIA-
TION, INC. FOR LEAVE TO FILE BRIEF AS AMICUS
CURIAE. WITH BRIEF ATTACHED

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Supreme Court of the United States

OCTOBER TERM, 1962

No. 392

AGNES K. HEAD, d/b/a LEA COUNTY PUBLISHING CO.,
AND PERMIAN BASIN RADIO CORPORATION, *Appellants*

v.

NEW MEXICO BOARD OF EXAMINERS IN OPTOMETRY

On Appeal From The Supreme Court of the State of
New Mexico

MOTION OF THE AMERICAN OPTOMETRIC ASSOCIATION, INC. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, WITH BRIEF ATTACHED

The American Optometric Association, Inc. by its attorneys, hereby respectfully moves the Court for leave to file the attached brief as *amicus curiae*, and, in support of this motion, respectfully states as follows:

1. The ~~appellant~~ has given its consent in writing to the filing by the American Optometric Association, Inc. of a brief as *amicus curiae*, but the appellants have withheld their consent, thereby necessitating the filing of this motion.

2. The American Optometric Association, Inc., organized in 1897 and incorporated in 1918 as a non-profit membership organization under the laws of the

State of Ohio, is the national organization representing the profession of optometry, having approximately 11,000 members, which constitutes approximately seventy-five per cent of all eligible practicing optometrists in the country.

The optometrist is the only practitioner especially and exclusively trained to examine and refract the eyes of his patient for defects in vision. The practice of optometry has been defined to be the science and art devoted to the examination of the eyes, the analysis of the ocular functions and the employment of preventive and corrective methods for the relief of visual and ocular abnormalities. The profession of optometry, as it has grown, and as it is now constituted, is a single, complete and unified service, consisting not only of the examination and refraction of the eyes, but also of the prescribing and furnishing of eyeglasses or vision training, or both, as may be found necessary by the optometrist.¹

¹ For background purposes, it is helpful to distinguish the optometrist from the ophthalmologist, the oculist, and the optician. The ophthalmologist is a physician who has taken post graduate work in the eye and has passed examinations given by the American Board of Ophthalmology. He is specially trained to perform eye surgery and to treat diseases of the eye. He is accredited and is a diplomate in ophthalmology.

The oculist is also a physician, who, on his own, has decided to specialize in the eye. He usually practices, in addition, the specialties of the ear, nose, and throat. The ophthalmologist and the oculist usually write prescriptions for eyeglasses; they do not ordinarily fill the prescriptions or provide the glasses themselves.

The optician, sometimes called a dispensing optician or an ophthalmic dispenser, is a mechanic who fills the prescriptions for eyeglasses written by the ophthalmologist or oculist. The optician is not qualified to examine the eye or to write prescriptions for eyeglasses.

In the past fifty years, the public need for the best obtainable visual care and for the highest professional standards in the practice of optometry has greatly increased. Tolerances in a number of industries are measured with far greater accuracy than was formerly the case, making greater demands on human vision. The motor vehicle, car or truck, is a dangerous instrumentality in the hands of a driver with poor vision. The enormous increase in the use of the public highways demands more effective use of the police power in this area both for the better visual health of the citizen and for the public safety.

Devoted from its inception to the protection and care of the vision of the public, the American Optometric Association, Inc., seeks to elevate the standards and practice of the profession of optometry, so that the public health, safety, and welfare will be protected from the untrained, the unqualified, the unethical, the unprofessional, and the charlatan.

3. The Association has been, and continues to be, interested in legislation and litigation affecting the practice of the profession of optometry and the field of visual care. It constantly guides and counsels toward greater professional status, attainment, and achievement, through better education and through the enactment of salutary legislation for the public and the profession.

Hence, the American Optometric Association, Inc., has a vital interest in the matters asserted before the Court in this case. We support the decision in this case of the Supreme Court of New Mexico. But our interest in doing so is not believed to be identical with that of the appellee. In rejecting appellants' contention of

a violation of the Commerce Clause, the Supreme Court of New Mexico distinguished New Mexico's provision against price advertising of eyeglasses from an absolute prohibition of all advertising of eyeglasses. Affirmance here on the basis of any such distinction would make doubtful the validity of an absolute prohibition on such advertising.² We believe the absolute prohibition better calculated for protection of health in visual care and strengthening of the standards of the profession of optometry. So we seek to defend New Mexico's partial advertising restriction on broader grounds than were utilized in the court below.

4. Our interest goes beyond that. The appellants urge the invalidity of the decision below on grounds of federal preemption, violation of the Commerce Clause and violation of the First Amendment as included in the Fourteenth. The American Optometric Association, Inc., as a national organization, is particularly equipped to defend against these contentions of federal law, and, in aid of the Court's function of balancing state and federal interests, to point up the deleterious effect of a reversal here on the laws of many states besides New Mexico.

5. The American Optometric Association, Inc. participated as *amicus curiae* in this Court in *Williamson v. Lee Optical Co.*, 348 U.S. 483, not only filing a brief, but also arguing orally before the Court. The Association is familiar with that proceeding and with the briefs and record in that case and is particularly well

² See, for example, the Oklahoma provision (Okla. Stats. Ann., Title 59, Sec. 943) against all such advertising which was upheld, at least against due process attack, in *Williamson v. Lee Optical Co.*, 348 U.S. 483.

equipped to set forth an evaluation of the impact of the decision in *Williamson* on the interstate commerce questions presented here.

For the foregoing reasons, therefore, it is respectfully submitted that the motion of the American Optometric Association, Inc. for leave to file the attached brief as *amicus curiae* should be granted.

Respectfully submitted,

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OCTOBER TERM, 1962

No. 392

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BRIEF FOR THE AMERICAN OPTOMETRIC
ASSOCIATION, INC. AS AMICUS CURIAE

THE INTEREST OF THE AMERICAN OPTOMETRIC
ASSOCIATION, INC.

The interest of the American Optometric Association, Inc. is set forth in the Motion of the American Optometric Association, Inc. for Leave to file this brief as *amicus curiae*, *supra*, pp. 1-5.

STATUTE INVOLVED

The enforcement provisions of the New Mexico statute regulating the practice of optometry, Section 67-7-13 of the New Mexico Statutes Annotated, 1953 Compilation, are set forth in the Appendix.

STATEMENT

This proceeding is here on appeal from a judgment (R. 52-53) of the Supreme Court of New Mexico which upheld the validity of an injunction (R. 21) granted by the District Court of Lea County, New Mexico. The injunction, so far as is material here, was granted in favor of the appellee, New Mexico Board of Examiners in Optometry (hereinafter called New Mexico) and against the appellants, Agnes K. Head, d/b/a Lea County Publishing Co., and Permian Basin Radio Corporation (hereinafter called "Head" and "Permian," respectively). The injunction enjoined Head and Permian from accepting or publishing within the State of New Mexico price advertising of eyeglasses from one Abner Roberts (hereinafter called "Roberts").

The facts of record, albeit somewhat thin, are not in dispute. The State of New Mexico has enacted extensive statutes which provide a comprehensive system for the regulation of the practice of optometry. New Mexico Statutes Ann., Secs. 67-7-1 to 67-7-14. One subsection of New Mexico's statutory system forbids,

The injunction (R. 21) and the New Mexico statute which it enforced (see the Appendix) actually state broader and more inclusive terms of forbidden advertising relating to eyeglasses than is necessarily implied by the short-hand reference "price advertising of eye glasses." However, in this case nothing depends on the difference between actual wording and the short-hand reference we use.

and provides criminal penalties for, price advertising of eyeglasses. New Mexico Statutes Ann., Sec. 67-7-13 (m) which is set forth in the Appendix.

We turn now to the community of Hobbs, New Mexico, and its surrounding market area. Hobbs is close to the Texas state line (R. 31, 38). Roberts practices optometry in Texas a few miles east of Hobbs, and just across the Texas state line. He holds a license from New Mexico to practice optometry in New Mexico (R. 2, 4, 7, 18). Permian, a radio station resident and operated in Hobbs, serves Hobbs and its surrounding area lying partly in New Mexico and partly in Texas (R. 2, 7, 18, 28). Head, a resident of Hobbs, owns a weekly newspaper called the "Hobbs Flare" which is published in Hobbs. The "Hobbs Flare" has a Second Class Mailing Permit. The "Hobbs Flare" has a "circulation" in the marketing area around Hobbs, both in New Mexico and Texas. It also has a "circulation" in thirteen other states and the District of Columbia. The extent of neither "circulation" appears in the record (R. 2, 4, 18, 29, 37).

Roberts, over a period of time, placed price advertisements of his eyeglasses with Head in Hobbs, which Head published in the "Hobbs Flare," and with Permian in Hobbs, which Permian broadcast over its broadcast facilities located in Hobbs (R. 2, 3, 5, 7, 18-19).

New Mexico sued to enjoin Head, Permian, and Roberts from publishing and broadcasting Roberts' price advertisements of eyeglasses, and alleged that such publication and broadcasting, unless restrained, would continue in violation of the New Mexico prohibition of price advertising of eyeglasses (R. 1-3). Head and

Permian, so far as is pertinent here, defended solely on constitutional grounds (R. 4, 7). Roberts did not appear, but the state trial court enjoined Head and Permian "from accepting or publishing within the State of New Mexico" price advertising from Roberts (R. 21). In doing so, the Court concluded that Head, Permian, and Roberts were all engaged in violation of the New Mexico price advertising prohibition, and that Head and Permian were "aiding and abetting in, and encouraging" such violation (R. 19). The Supreme Court of New Mexico upheld the injunction against Head and Permian (R. 52-53). They appealed to this Court.

SUMMARY OF ARGUMENT

I. Preemption

The Federal Communications Act itself does not preempt New Mexico's action. Neither does any required uniformity in the interstate commerce field. Many decisions of this Court, validating state police power action, have led to less uniformity in comparable fields of interstate commerce, than would affirmance here. Finally, there is no action by the Federal Communications Commission that covers what New Mexico has done. If there were such action by the Federal Communications Commission, it would be in the protection of interests different from the interest which New Mexico seeks to protect; hence, there would be no preemption.

II. Interstate Commerce

New Mexico, in an indisputably valid exercise of her police power so far as the Due Process Clause is concerned, has enacted a general statute applicable equally

and without discrimination to all within her borders, whether engaged in interstate commerce or not. The injunction in enforcement of the general statute is directed solely against residents of New Mexico, and enjoins action only within New Mexico. No loss to interstate commerce is shown to result from the injunction. Such action by New Mexico is well within the decisions of the Court upholding state police power action affecting interstate commerce, especially where as here, the interstate commerce involved is essentially local, and the State is attempting to solve a local problem.

III. First Amendment

Nothing is involved in this case except purely commercial advertising. Such advertising is not entitled to First Amendment protection, at least in the absence of any design to eliminate expression of opinion by advertising media. Since there is no First Amendment protection, any issue as to prior restraint is pointless. If the First Amendment had some application here, the balancing of interests would favor New Mexico; for the interest of appellants is only in advertising revenue to which no injury has been shown, whereas the interest of New Mexico, and other states which have similar optometric statutes, is in the health of their citizens. It is late in the day to urge prior restraint against advertising restrictions directed to the practices of the quack and charlatan. Compare the familiar cease and desist orders of the Federal Trade Commission. Finally, the fact that the appellants in other aspects of their business are engaged in the dissemination of opinion does not give them a right to be free from state regulation directed to solution of local problems.

ARGUMENT

I.

NEW MEXICO'S PROHIBITION OF PRICE ADVERTISING OF EYEGLASSES AS APPLIED HERE IS NOT PREEMPTED BY THE FEDERAL COMMUNICATIONS ACT

A. The Setting in Which the Question of Preemption is Presented

In prohibiting price advertising of eyeglasses New Mexico has, as against the due process clause, validly exercised its police power in protection of the health of its citizens. So much is indisputable. See *Williamson v. Lee Optical Co.*, 348 U.S. 483 (prohibition of all advertising of eyeglasses held valid); *Semler v. Dental Examiners*, 294 U.S. 608 (prohibition of price advertising by dentists held valid); and *Roschen v. Ward*, 279 U.S. 337 (prohibition of sale of eyeglasses where no licensed physician or optometrist in attendance held valid). Such a prohibition as New Mexico's is "rationally related to the public health and welfare" (*Williamson* at p. 489); and there is "no constitutional reason why a State may not treat all who deal with the human eyes as members of a profession who should use no merchandising methods for obtaining customers" (*Williamson* at p. 490). With respect to price advertising in a professional field, the legislation of New Mexico was, as this Court held on the same point, in *Semler*, at p. 613, "entitled to consider the general effects of the practices which it described, and if these effects were injurious in facilitating unwarranted and misleading claims, to counteract them by a general rule, even though in particular instances there might be no actual deception or misstatements." The general rule on price advertising of eyeglasses prohibits what was observed by this Court in *Semler* at p. 612 to be generally "the practice of the charlatan and the quack."

New Mexico's statute provides criminal penalties of fine and imprisonment for its violation. See Section 67-7-13 in the Appendix. But in the absence of Roberts, New Mexico enforced its price advertising prohibition against Head and Permian by injunction rather than by fine and imprisonment.

The Congress could prohibit a state from doing what New Mexico has done, that is to say, the Congress could have prohibited the issuance of a state court injunction against the radio station there. But Congress has made no such express prohibition. The question here is whether, nevertheless, Congress, by reason of the Federal Communications Act, 47 U.S.C. 151 ff., has preempted the field of radio broadcasting so as to supersede New Mexico's prohibition as applied to radio.² To a determination of this question of preemption, it is immaterial that Roberts is a resident of Texas rather than New Mexico. Preemption would forbid the application of New Mexico's prohibition to the radio advertising of violators resident within her own borders. And it would appear to make no difference whether the State seeks enforcement by injunction against the resident advertiser, or by injunction against the resident radio broadcaster, or by criminal prosecution against either or both. If preemption were to prevent the State from making the advertising illegal for radio

² The jurisdictional statement of Permian did not present this question (R. 57). With respect to whether the injunction here has conflicted with Permian's duties as a broadcaster or with the duties of the Federal Communications Commission as administrator of the Federal Communications Act, it is also of some significance that until invited by this Court to do so, the Commission and the United States did not seek to appear in this litigation to urge preemption. See *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179, 188.

broadcasting, it would seem to follow that the State in view of the Supremacy Clause could not punish or restrain such advertising. This is the context of the preemption question from the State or local viewpoint.

From the national viewpoint, it is relevant to the context here that we are not concerned with the field of subversion of the national sovereignty, where the national interest is at its greatest, compare *Pennsylvania v. Nelson*, 350 U.S. 497.³ Neither are we concerned with the field of foreign relations where state power is "at its narrowest limits." See *Allen-Bradley Local v. Wisconsin Board*, 315 U.S. 740, 749, and compare *Hines v. Davidowitz*, 312 U.S. 52. We deal here with the field of interstate commerce. And in that field, this Court has recognized, at least since *Cooley v. Board of Port Wardens*, 12 How. 299, that there is much room for the valid application to interstate commerce of general legislation passed by a State in the exercise of its police power—even when there is federal legislation with respect to the particular type of interstate commerce affected. See the cases cited at pp. 16-18, *infra*.

Finally, as to context, the validity of New Mexico's price advertising prohibition under the Commerce Clause (Point II, *infra*) and the First Amendment (Point III, *infra*) is assumed for the purposes of the discussion of the preemption point. If the Commerce Clause alone forbade New Mexico's action, discussion

³ But in the closely related field of defense of the national sovereignty, a State is not preempted from punishing speeches against army enlistments which are already made criminal under federal law. *Gilbert v. Minnesota*, 254 U.S. 325; and cf. *Halter v. Nebraska*, 205 U.S. 34 (at least in the absence of federal legislation, a State may validly punish the use of the national flag for advertising purposes).

of the preemption question would be pointless; and if the First Amendment forbade such action, federal preemption would be impossible.⁴

B. The Federal Communications Act, Itself, Does Not Preempt New Mexico's Action

With respect to radio and television, the Act sets up a licensing system in which the Federal Communications Commission (hereinafter called the Commission) is empowered to grant, renew, revoke, or modify licenses for broadcasting and broadcasting equipment, and to approve or disapprove transfers of such licenses, all under a general standard of the public interest, convenience or necessity. In cases not concerned with preemption, the Court has referred to this licensing system as a "unified and comprehensive regulatory system" for radio. See *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137; *Scripps-Howard Radio v. Com'n.*, 361 U.S. 4, 6; and *National Broadcasting Co. v. United States*, 319 U.S. 190, 213. Those statements, which are "mere generalities" in the present context, are urged by the appellant Permian, (but not by the United States) to show preemption by the Act. In refutation of that aspect of appellant's argument it is sufficient to quote Mr. Justice Frankfurter, dissenting but not on this point in *Hill v. Florida*, 325 U.S. 538, 552:

A survey of the scores of cases in which the claim has been made that State action cannot survive some contradictory command of Congress leaves

⁴ The appellants cannot be right on both the First Amendment and preemption questions. They have to be wrong on at least one of them.

no doubt that State action has not been set aside on mere generalities about Congress having "occupied the field" or on the basis of loose talk instead of demonstration about "conflict" between State and federal action. We are in the domain of joint and practical affairs, and this Court has not stifled State action unless what the State has required, in the light of what the Congress has ordered, would truly entail contradictory duties or make actual, not argumentative, inroads on what Congress has commanded or forbidden.

There is nothing specific in the Act itself which conflicts with New Mexico's statute, and none is claimed by the United States or by the appellants. In the absence of a direct conflict, Federal codes of regulation, fairly comparable in unity and comprehensiveness to the Federal Communications Act, have not preempted state police power action applicable to any aspect of interstate commerce—whether it be to interstate railroads generally subject to the "broad sweep"⁶ of the Interstate Commerce Act,⁷ or to interstate taxicabs and

⁶ See *Kelly v. Washington*, 302 U.S. 1, 13.

⁷ Despite the Interstate Commerce Act the Court has upheld state statutes requiring that railroad passenger cars be heated and guard post placed on railroad bridges, *N.Y., N.H., & H.R.R. Co. v. New York*, 165 U.S. 628; that every railroad cause three of its regular passenger trains to stop each way daily at every village with inhabitants over three thousand, *Lake Shore & Michigan Southern R.R. Co. v. Ohio*, 173 U.S. 285; that railroad trains limit their speed within cities to six miles per hour, *Erb. v. Morash*, 177 U.S. 284; that locomotive headlights meet a prescribed standard, *Atlantic Coast Line R.R. v. Georgia*, 234 U.S. 280; that railroad trains carry prescribed "full crews," *Chicago, Rock Island & Pacific Ry. v. Arkansas*, 219 U.S. 453, and *St. Louis, Iron Mountain & Southern Ry. Co. v. Arkansas*, 240 U.S. 518; that a railroad eliminate grade crossings, although its solvency be imperilled, *Erie R.R. Co. v. Public Utility Commissioners*, 254 U.S. 394; and that all the railroads entering a city build a union passenger station, *Atchison, T. & S. P. Ry. Co. v. Railroad Commission*, 283 U.S. 380, 391.

interstate travel bureaus subject to the federal Motor Carriers Act,⁸ or to interstate tugs not within the lower tonnage and motor power limits of federal ship safety inspection laws,⁹ or to interstate ships which are subject to the "extensive and comprehensive set of controls over ships and shipping" provided by Congress,¹⁰ or to licensing of customs-brokers in foreign commerce with respect to the identical business for which they are already licensed under federal statute,¹¹ or to interstate pipelines generally subject to the federal Natural Gas Act,¹² or to the labeling of products transported in interstate commerce and subject to the labeling requirements of the federal Pure Food and Drug Act,¹³ or to the interstate transportation of animals subject to the interstate transportation requirements of the federal Animal Industry Act or the federal Cattle Contagious Disease Act,¹⁴ or to the labor relations of interstate employers generally subject to the National Labor Relations Act and the federal Labor Management Rela-

⁸ *Buck v. California*, 343 U.S. 99 (county requirement of a driver's permit held valid as applied to taxicab merely going through the county on trip in interstate and foreign commerce); *California v. Zook*, 336 U.S. 725 (state prohibition of operation of travel-bureau without U.C.C. permit upheld).

⁹ *Kelly v. Washington*, 302 U.S. 1.

¹⁰ *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440.

¹¹ *Union Brokerage Co. v. Jensen*, 322 U.S. 202.

¹² A state may regulate the direct sales of an interstate pipeline to an industrial consumer. *Panhandle Co. v. Michigan Com'n.*, 341 U.S. 329; *Panhandle Pipe Line Co. v. Com'n.*, 332 U.S. 507.

¹³ *Savage v. Jones*, 225 U.S. 501.

¹⁴ *Reid v. Colorado*, 187 U.S. 137; *Mintz v. Baldwin*, 289 U.S. 346.

tions Act,¹⁵ or to the interstate transportation of raisins regulated by a state stabilization program which could be suspended by a federal stabilization program under the Agricultural Marketing Agreement Act.¹⁶

It should be observed that in many of the foregoing illustrations of valid state action applicable to interstate commerce despite federal codes of regulation, state codes and federal codes covered the same basic subject, as, for example, transportation, ship inspection, gas transmission, product labeling, labor relations, and crop stabilization. Here, there is even less reason for finding preemption by the Federal Communications Act, for the federal act and New Mexico's statute are not directed to the same basic subject. See *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 206; and cf. *Guss v. Utah Labor Board*, 353 U.S. 1, 6; *Pennsylvania v. Nelson*, 350 U.S. 497; and *Hines v. Davidowitz*, 312 U.S. 52, 61. The State act is directed to the regulation of optometry. The federal act is directed to the regulation of radio, and contains no regulation of advertising on radio that is generally or specifically applicable here.¹⁷ By separate and specific amendments, the Con-

¹⁵ Contrast *Auto Workers v. Wisconsin Board*, 336 U.S. 245, and *Allen-Bradley Local v. Wisconsin Board*, 315 U.S. 740, where the Court found no conflict between federal and state regulation, with *Bethlehem Co. v. State Board*, 330 U.S. 767, *Guss v. Utah Labor Board*, 353 U.S. 1, and *Hill v. Florida*, 325 U.S. 538, where the Court did find such conflict.

¹⁶ *Parker v. Brown*, 317 U.S. 341.

¹⁷ Section 303(m) authorizes suspension of a radio operator's license for false or deceptive signals, but by its own terms it is not applicable to station licenses. Section 326 contains a prohibition of free speech censorship by the Commission of program content.

gress has required announcements of the fact of payment to a broadcaster for a particular program (Section 317), and has imposed restrictions on quiz programs and "payola" (Sections 508 and 509). And by separate additions to the Criminal Code, Congress has prohibited fraud by radio and television, 18 U.S.C. Sec. 1343, and the broadcasting of lottery information, 18 U.S.C. Sec. 1304. The piecemeal approach shown by these individual actions of Congress, all of which affect radio advertising without touching optometric price advertising, rationally suggests that the Federal Communications Act does not preempt New Mexico's exercise of its police power over optometric price advertising by radio.

In any event, the decisions of the Court foreclose any contention that the Federal Communications Act preempts the field of radio so as to invalidate *non-conflicting* state action under state police power which affects radio broadcasting. *Regents v. Carroll*, 338 U.S. 586 (The Federal Communications Commission finds a contract entered into by a radio broadcast licensee to be not in the public interest and refuses renewal of its license unless the contract is repudiated; nevertheless, a state court judgment for the damages consequent upon the licensee's repudiation *held valid*); *Radio Station WOW v. Johnson*, 326 U.S. 120 (The Federal Communications Commission approves the transfer of licensed radio broadcasting facilities from lessor to lessee as in the public interest; nevertheless state court order compelling the return of the licensed facilities to the lessor because of fraud *held valid*); see *Fisher's Blend Station v. Tax Com'n*, 297 U.S. 650, 656; and cf. *United States v. R.C.A.*, 358 U.S. 334 (Approval by the Federal Communications Commission of an ex-

change of television stations by broadcast licensees as being in the public interest does not bar prosecution for a resulting antitrust violation).¹⁵

C. No Dominant Federal Interest in Uniform Regulation of Radio Broadcasting Advertising Content Preempts New Mexico's Action

The United States urges (Brief for the United States, pp. 24-27) that a dominant federal interest in uniform regulation of radio advertising preempts the application of New Mexico's statute to radio advertising. Congress has declared no such dominant federal interest in uniform regulation of radio advertising. In its absence, the suggestion of such a dominant federal

¹⁵ In accord as *Kroeger v. Stahl*, 248 F.(2d) 121 (C.A. 3, 1957) (Approval by the Federal Communications Commission of a particular site for the transmitter of a mobile radio station licensee does not permit violation of local zoning ordinance which classifies the approved site as residential). *Farmers Union v. WDAY*, 360 U.S. 525; *Allen B. Dumont Laboratories v. Carroll*, 184 F.(2d) 153 (C.A. 3, 1950), and *Lamb v. Sutton*, 164 F. Supp. 928 (M.D. Tenn., 1958), aff'd, 274 F.(2d) 705 (C.A. 6, 1960), cert. den. 363 U.S. 830, emphasize the point we make in the text. In those cases, the courts found preemption of state action because of conflict with a specific provision of the Federal Communications Act, namely, Section 315 which forbids censorship of the speeches of political candidates (the *Farmers Union* and *Lamb* cases), and Section 326 which forbids free-speech censorship of programs (the *Allen B. Dumont Laboratories* case). The dictum in *Allen B. Dumont Laboratories*, 184 F.(2d) at p. 455, that "it was the intention of Congress to occupy the television broadcasting field in its entirety" cannot be squared with the decisions of this Court cited in the text unless the dictum is qualified by the context in which it was stated.

interest in a field of interstate commerce is novel but untenable. The United States cites no decision which held preemption on the ground of such a dominant federal interest in interstate commerce. Instead, the United States argues that radio advertising cannot be changed as it crosses a state line, so diverse state statutes on advertising will burden it, and hence a dominant federal interest in uniformity must be assumed.¹⁹ The first clear answer to that argument lies in the very nature of all interstate commerce, including radio advertising. It is always impossible, impractical or difficult for any kind of commerce (not radio alone) to change as it crosses a state line. It is so with interstate railroads, interstate taxicabs, interstate pipelines transmitting gas, and interstate shipments of labeled products. Nevertheless state regulation which does not conflict with Federal regulation is not preempted. See the many cases cited *supra* at pp. 16-18; and, since the argument of the United States is essentially one of violation of the Commerce Clause, see also our Point II, *infra*.

Second, the United States writes in the large of the "incalculable mischief and confusion" arising from a "jumble of [state] directives" relating to advertising. But only the New Mexico statute is cited, together with an erroneous assertion that "Texas does not impose

¹⁹ So far as we can understand the Brief for the United States, its argument on dominant federal interest in uniformity confuses preemption with violations of the Commerce Clause. See Brief for the United States, pp. 26-27. Nevertheless, we respond to the argument at this point in our text.

restrictions on advertising by optometrists." Brief for the United States, p. 25. Decision cannot be predicted on such a showing or lack of showing of generally asserted conflicts or diversities. See *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 448; *California v. Zook*, 336 U.S. 725, 736; *Panhandle Pipe Line Co. v. Com'n*, 332 U.S. 507, 523; and *Hill v. Florida*, 325 U.S. 538, 552 (opinion of Frankfurter, J., dissenting but not on this point).

Third, state regulation of optometric price advertising is in fact fairly uniform. Like New Mexico, thirty-one other states have proscriptions on price advertising of eyeglasses and other optometric materials. Like

²⁰ As pointed out by the appellants in their brief at page 9, Texas prohibits:

... any statement or advertisement concerning ophthalmic lenses, frames, eye-glasses, spectacles or parts thereof which is fraudulent, deceitful, misleading, or which in any manner whatsoever tends to create a misleading impression, including statements or advertisements of bait, discount, premiums, price, gifts or any statements or advertisements of a similar nature, import or meaning. (*Vernon's Texas Civil Statutes*, Art. 456g)

²¹ Ark. Stat. sec. 72-813 (1957 Repl.); Cal. Ann. Code, Bus. and Professions, sec. 3129 (1962); Del. Code Ann. tit. 24, sec. 2113 (1953); Fla. Stat. Ann. sec. 463.11, 463.14; Hawaii Rev. Laws sec. 68-9 (1955); Ind. Stat. secs. 63-101sa, 63-1019; Ky. Rev. Stat. sec. 320.300; La. Rev. Stat. sec. 34 (1963); Mass. Gen. Laws Ann. ch. 112, sec. 73, (A); Mich. Laws Ann. sec. 14.648 (1956); Minn. Stat. Ann. sec. 148.57 (3); Mo. Rev. Stat. sec. 336.110 (Vernon); Mont. Rev. Codes sec. 66-1302 (1947); Neb. Rev. Stat. sec. 71-148 (1958); Nev. Rev. Stat. sec. 636.300; N.H. Rev. Stat. sec. 327.20; N.J. Stat. Ann. sec. 45-12-11; N.M. Stat. Ann. secs. 67-7-9, 67-7-13; N.C. Gen. Laws sec. 90-124; N. Dak. Cent. Code sec. 43-13-29 (absolute prohibition); Okla. Stat. tit. 59, secs. 585, 943 (1961); Ore. Rev. Stat. secs. 683.140 (3), 683.140 (6); Pa. Stat. Ann. tit.

Texas (see fn. 20), forty-three other states have prescriptions of false, misleading, fraudulent, or bait advertising of eyeglasses and other optometric materials. The difference between the two types of prohibitions is not significant from a broadcaster's viewpoint. Prohibi-

63, sec. 237 (Purdon); R.I. Gen. Laws sec. 5-35-22; S.C. Code of Laws sec. 56-1075; S. Dak. Code sec. 27-0707 (1960 Supp.); Tenn. Code Ann. secs. 63-815, 63-822, 63-1404; Utah Code Ann. sec. 58-16-14 (1953); Va. Code secs. 54-388, 54-396, 54-398-23 (1950); Wash. Rev. Code Ann. secs. 18-53-140, 18-34-090; W. Va. Code sec. 20-37 (1961); Wis. Stat. Ann. secs. 153.08, 153.10; Wyo. Stat. sec. 33-301.

Ala. Code, tit. 46, sec. 214; Ark. Stat. sec. 72-815 (1957 Repl.); Cal. Ann. Code, Bus. and Professions sec. 3104 (1962); Colo. Rev. Stat. sec. 102-2-17 (1953); Conn. Gen. Stat. sec. 20-133 (d) (1958); Del. Code Ann. tit. 24, sec. 2113 (1953); Fla. Stat. Ann. sec. 463.11; Ga. Code Ann. sec. 84-3507; Hawaii Rev. Laws, sec. 68-9 (1955); Idaho Code sec. 54-6512 (1948); Ill. Ann. Stat. Ch. 91, sec. 105-13 (Smith-Hurd); Ind. Stat. sec. 63-1018a (Burns 1961); Iowa Code Ann. sec. 147.55; Kan. Gen. Stat. sec. 65-1506, 1510; Maine Rev. Stat. Ch. 76, sec. 40 (1954); Md. Ann. Code Art. 43, sec. 389 (1957); Mass. Gen. Laws Ann. Ch. 112, sec. 73 (A); Mich. Laws Ann. sec. 14-648 (1956); Mo. Rev. Stat. sec. 336-110 (Vernon); Mont. Rev. Codes sec. 66-1312 (1947); Neb. Rev. Stat. sec. 71-147, 71-148 (1958); Nev. Rev. Stat. sec. 636.300, 636.380; N.H. Rev. Stat. sec. 327:20; N.J. Stat. Ann. sec. 45-12-1; N.M. Stat. Ann. sec. 67-7-9; N.Y. Education Law sec. 7108 (1); N.C. Gen. Laws sec. 90-124; N. Dak. Cent. Code sec. 43-13-22; Ohio Rev. Code sec. 825.41 (Baldwin); Okla. Stat. tit. 59, sec. 585 (1961); Ore. Rev. Stat. sec. 683-140 (3); Pa. Stat. Ann. tit. 63, sec. 237 (Purdon); R.I. Gen. Laws sec. 5-35-19 (1956); S.C. Code of Laws sec. 56-1075, 56-1077; S. Dak. Code sec. 27-0707 (1960 Supp.); Tenn. Code Ann. secs. 63-815, 63-822; Texas Civil Stat. Art's. 4563, 4465g; Utah Code Ann. sec. 58-16-14; Vt. Stat. Ann. tit. 26, sec. 1695; Wash. Rev. Code Ann. secs. 18-53-100, 18-53-140, 18-34-090; W. Va. Code sec. 20-37 (1961); Wis. Stat. Ann. sec. 153.10; Wyo. Stat. secs. 33-300, 33-301.

tions of false, misleading or bait advertising may require proof of falsity in fact for successful prosecution,²³ whereas flat prohibitions of price advertising will not. The statutes of all of these states are directed in the interest of the public health against the same evil "the [price] practice of the charlatan and the quack" in the field of optometry. *Semler v. Dental Examiners*, 294 U.S. 608, 612. The presence of all these state statutes provides but another reason for not finding preemption here; where, at a minimum, none clearly exists. *Halter v. Nebraska*, 205 U.S. 34, 39;²⁴ see *Silz v. Hesterberg*, 211 U.S. 31, 40, and comment thereon in *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 525.

Fourth, if and when the Congress finds diversity in the field with which we are concerned, and finds diversity undesirable, it will preempt such diversity by enactment of such uniform rule as it deems beneficial. If and when Congress does so, almost surely it will not be a rule leaving radio free to accept advertisements and newspapers not. In the final analysis, preemption

²³ See e.g. *Shannon v. Rogers*, 159 Tex. 29; 314 S.W. (2) 810 (1958).

²⁴ In *Halter*, the Court noted that more than half of the states had statutes "substantially similar in their general scope to the Nebraska statute" there under constitutional attack; and stated "that fact is one of such significance as to require us to pause before reaching the conclusion that a majority of the states, have, in their legislation, violated the Constitution of the United States." The Nebraska statute was upheld.

Contrast the opinions of the Court in *Near v. Minnesota*, 283 U.S. 691, 719, and *Grosjean v. American Press Co.*, 297 U.S. 233, 250. In each of those cases, a state statute was held invalid with the comment that the uniqueness of the statute in our history was "significant."

rests on the intent of Congress. *Guss v. Utah Labor Board*, 353 U.S. 1, 10. And preemption here can only mean a rule on advertising which discriminates in favor of Permian against Head, or to put it in its broadest terms, in favor of radio and television against newspapers and all other forms of competing advertising media. Entirely apart from the Due Process difficulties that would arise from such a rule if Congress were to adopt it, there is nothing here to suggest that Congress intended to adopt a rule so drastic in its diverse impact on competing advertising media.

D. There is Nothing in the Administration of the Federal Communications Act by the Commission Which Preempts New Mexico's Action.

The arguments of the United States (its brief, pp. 12-23) and Permian (Brief for the appellants, pp. 27-28) appear to be premised upon the thought that New Mexico's law is preempted so long as the Commission has some kind of power over radio advertising and takes some kind of action pursuant to it. The thought is plainly erroneous. The rules of judicial adjudication pertaining to preemption of state laws by federal agency action are much more precise, and extremely stringent. "In a situation like the present, where" Permian's "enterprise touches different and not common interests between Nation and State" the "task" of the Court "is that of harmonizing these interests without sacrificing either." See *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 207. Preemption "must be clearly manifested." See *California v. Zook*, 336 U.S. 725, 733. So it is that preemption requires a direct and

positive conflict between federal and State action.²⁵ As the Court summed it up in *Kelly v. Washington*, 302 U.S. 1, 10:

The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together.

And more recently the Court in rejecting a contention of preemption stated (*Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 446):

To hold otherwise would be to ignore the teaching of this Court's decisions which enjoin seeking out conflict between state and federal regulation where none clearly exists.

The materials on Commission administration cited by Permian and the United States do show that the Commission has something to do with the advertising content of radio programs. However, since they proceed on an erroneous premise, the very materials they cite also show that Commission action does not conflict with New Mexico's.

The Commission has no power to order Permian or any other broadcaster to accept or reject any advertise-

²⁵ The decisions start as early as *Simot v. Davenport*, 22 How. 227, 243, and continue through *Missouri, K. & T. R. Co. v. Haber*, 169 U.S. 613, 623; *Gilvary v. Cuyahoga Valley R. Co.*, 219 U.S. 57, 60; *Townsend v. Ycomans*, 301 U.S. 441, 454; *Kelly v. Washington*, 302 U.S. 1, 10; *California v. Zook*, 336 U.S. 725, 729; *Panhandle Co. v. Michigan Com'n*, 341 U.S. 329, 336; *Back v. California*, 343 U.S. 99, 102; to *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 446.

ment. "The Commission is given no supervisory control of the programs; of business management or of policy." *Commission v. Sanders Radio Station*, 309 U.S. 470, 475. The Commission cannot regulate "the licensee's business as such." *Regents v. Carroll*, 338 U.S. 586, 598. Other than the withholding of a license, it has no sanction to apply against programming, whether advertising or otherwise. See *Regents v. Carroll*, 338 U.S. 586, 598.²⁶

As the Commission itself has always recognized, its power over programming content is confined to determination of the question whether the grant of a license would serve the statutory standard of "public interest, convenience and necessity." So the Commission has succinctly advised the Congress:

²⁶ The United States cites provisions of the Federal Communications Act (P. 10 of its brief) which in other connections, but not programming, authorize the Commission to issue cease and desist orders, Section 312(b), and to exact monetary forfeitures, Section 503. The United States does not contend that those provisions are applicable to programming, whether advertising or otherwise. But in the absence of this explanatory note, the impression conveyed by their citation might be unintentionally misleading.

In *National Broadcasting Co. v. United States*, 319 U.S. 190, 215, the Court stated that the Act "puts upon the Commission the burden of determining the composition of the [radio] traffic." The relevant context of that statement was:

It [the Act] puts upon the Commission the burden of determining the composition of the traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.

Plainly, the Court was speaking of selection of licensees and not selection of programs. Cf. Brief for the United States at p. 13.

The Commission has no authority to censor any program or programs, including advertising copy. The Commission's authority, therefore, with respect to the matter is limited to considerations of applications for renewal of license. (*Broadcasting of Programs, Advertising Alcoholic Beverages*, 5 Pike & Fischer, *Radio Regulations* 593, 594)

The Commission has uniformly advised its licensees to the same effect. *Commission Policy on Programming*, 20 Pike & Fischer, *supra*, 1901, 1910 (1960); *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1255. And such is its rule of decision in adjudication of cases. See, e.g., *In re Petition of the New Jersey Council of Christian Churches*, 14 F.C.C. 365, 366 (1949); *Application of the Northern Corp. (WMEX)*, 12 F.C.C. 940, 944; *In re McGlashan*, 2 F.C.C. 145, 152.

Entirely apart from the lack of power which it recognizes, the Commission considers the task of deciding what advertising or other program material a licensee should accept or reject as an "intolerable and impossible burden" for the Commission. See *Application of the Northern Corp. (WMEX)*, 12 F.C.C. 940, 944; *Commission Policy on Programming*, 20 Pike & Fischer *supra*, 1901, 1908 (1960); and *Note on the Regulation of Advertising*, 56 Columbia Law Rev. 1018, 1074.

Hence, Permian, as a licensee, has the discretion and the responsibility of selecting or rejecting advertising material for its broadcasts. *Commission Policy on Programming*, 20 Pike & Fischer, *supra*, 1901, 1912 (1960); *In re Petition of the New Jersey Council of Christian Churches*, 14 F.C.C. 365, 366 (1949); *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1255; *WREC Broadcasting Service*, 10 Pike & Fischer, *supra*, 1323, 1350 (1955); *In re McGlashan*, 2 F.C.C.

145, 152. The Commission holds that Permian, as a station licensee, "continues to bear legal responsibility for all matter broadcast over his facilities." *Commission Policy on Programming, supra* at p. 1913.

When Permian's license comes up for renewal, the Commission will adjudicate whether renewal would serve "the public interest, convenience and necessity." That sole, statutory standard for the Commission's adjudication is a "criterion . . . as concrete as the complicated factors for judgment in such a field permit." See *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138. Many factors other than programming are considered, such as whether the licensee is financially, technically, and legally qualified, whether the licensee's operation is efficient, and whether the licensee on the whole has conducted his station in his own interest rather than in the interest of his listening public. See e.g., *KFKB Broadcasting Ass'n. v. Federal Radio Commission*, 47 F(2d) 671 (C.A. D.C., 1931); *The Farmers & Bankers Life Ins. Co. (KFBI)*, 2 F.C.C. 455, 457; *Oak Leaves Broadcasting Station, Inc. (WGES)*, 2 F.C.C. 298, 299; *Knickrbocker Broadcasting Co., Inc. (WMCA)*, 2 F.C.C. 76, 77; *WSBC Incorporated*, 2 F.C.C. 293, 294. A particular program, advertising or otherwise, which is questionable, may be considered but only in the light of whether the licensee in his overall programming has exercised good faith and a reasonable judgment in serving the needs, tastes and desires of the listening public in the community or area served. *Commission Policy on Programming*, 20 Pike & Fischer, *supra*, 1901, 1909-1910 (1960); *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1255; *Capital Broadcasting Co., Washington, D. C.*, 12 F.C.C. 648; *WREC Broad-*

casting Service, 10 Pike & Fischer, *supra*, 1323, 1350 (1955); *Broadcasting of Programs, Advertising Alcoholic Beverages*, 5 Pike & Fischer, *supra*, 593, 594 (1949); *The Farmers & Bankers Life Ins. Co. (KFBI)*, 2 F.C.C. 455, 459; *Knickerbocker Broadcasting Co., Inc. (WMCA)*, 2 F.C.C. 76, 77. In that connection, Permian, as well as other licensees, is held to a "reasonable regard for the requirements of Federal and local law." See *Application of the Northern Corp. (WMEX)*, 12 F.C.C. 940, 944.

Since the Commission "may not condition" the renewal or denial of a license "upon its own subjective determination of what is or is not a good program" (*Commission Policy on Programming, supra* at p. 1907), the Commission relies on federal law or state law or even action by a state Better Business Bureau, whenever any of them is relevant, for guidance on whether a particular program, particularly an advertising program, is questionable or bad in serving the public interest of the licensee's community. See *Trinity Methodist Church, South v. Federal Radio Com'n.*, 62 F(2d) 850, 852-853 (C.A. D.C. 1932), cert. den. 284 U.S. 850 (Commission relied on state court statement that particular program obstructed justice); *Liaison Between F.C.C. & F.T.C. Relating to False and Misleading Radio & T.V. Advertising*, 22 F.C.C. 1572 (1957) ("Continued broadcasting by station licensees" of advertising matter found deceptive by the Federal Trade Commission "would raise serious questions as to whether such stations are operating in the public interest"; hence orders of the Federal Trade Commission will be distributed to licensees); *Public Notice on Double Billing Practices*, 23 Pike & Fischer, *supra*, 175 (laws on use of the mails and on unfair competition

referred to in considering fraudulent double billing practices); *Capital Broadcasting Co., Washington, D. C.*, 12 F.C.C. 648, 650, and *Community Broadcasting Service (WWBZ)*, 13 Pike & Fischer, *supra*, 179 (Programs on horse racing questionable if so designed as to aid to violations of state gambling laws); *WREC Broadcasting Service*, 10 Pike & Fischer, *supra*, 1323, 1350 (1955) (Efforts of State Better Business Bureau to stop "bait and switch" advertising shows licensee's carelessness in accepting such advertising); *The Farmers & Bankers Life Ins. Co. (KFBI)*, 2 F.C.C. 455, 457 (Commission relies on statement of a United States District Court that a particular program was in conflict with the ethics of the medical profession); *Oak Leaves Broadcasting Station, Inc. (WGES)*, 2 F.C.C. 298, 299-300, and *WSBC, Incorporated*, 2 F.C.C. 293, 294-295 (advertisement of patent medicine questionable because the advertiser had been convicted in state court of practicing medicine without a license and using title "Doctor" in advertisement when not licensed); *Broadcasting of Programs, Advertising Alcoholic Beverages*, 5 Pike & Fischer, *supra*, 593, 594 (1949) (Advertisement of liquor bad in localities and states where liquor sale or liquor advertisements are illegal under state law).

A questionable program so found is considered by the Commission together with all of the other factors we have indicated. Determination is then made by application of the statutory standard of "the public interest." Significantly, here, statutory "public interest" is the interest of the radio listeners. See *National Broadcasting Co. v. United States*, 319 U.S. 190, 216; *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138-139 n. 2; *Editorial-*

izing by *Broadcast Licensees*, *supra* at p. 1255; *Broadcasting of Programs, Advertising Alcoholic Beverages*, *supra* at p. 594; *Oak Leaves Broadcasting Station, Inc.*, *supra* at p. 301. If the factors, other than a questionable program, are generally good, and the licensee indicates a cessation of the questioned program, the "public interest" is usually found to be served by renewal of the license. As the Attorney General has observed the Commission's only sanction against a licensee who does not operate in "the public interest" is to "withdraw his broadcasting license—a sanction so severe that it has been imposed only rarely." See *Report by the Attorney General on Deceptive Practices in the Broadcast Media*, 19 Pike & Fischer, *supra*, 1901, 1905 (1959); and see, for specific examples of the balancing process that ends with license renewal, *Capital Broadcasting Co., Washington, D. C.*; *Matter of McGlashan, WSBC Incorporated*; *Knickerbocker Broadcasting Co., Inc. (WMCA)*; and *The Farmers & Bankers Life Ins. Co. (KFBI)*, all *supra*.

Such is the detail of the Commission's powers and administrative policies and decisions." The Commission has not ordered Permian or any other licensee to do anything anywhere about price advertising of eyeglasses. This suffices for no preemption; for the unexercised power of a federal agency provides no conflict warranting preemption. *Panhandle Co. v. Michigan Com'n*, 341 U.S. 329, 336; *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179, 187, 188; *Parker v. Brown*, 317 U.S. 341, 353; *Eichholz v. Public*

²¹ We do not understand any of this to be disputed by the United States, for the same picture emerges from its brief at pp. 12-23. The difference between us is on whether it requires preemption.

Service Comm., 306 U.S. 268; *Welch Co. v. New Hampshire*, 306 U.S. 9. But here where the Commission is without power there is not even a possibility under present law of any directly conflicting order in the future.

Had Permian complied with New Mexico's law, the Commission, in the light of its whole attitude of reliance on local law, would, on renewal application, certainly not find such compliance to be in violation of its duty of a reasonable effort to serve its local community with a reasonable regard for the local laws. As it stands, Permian's recalcitrance to the point of injunction may be questioned by the Commission on renewal application. If so, the Commission's decision will be based on all factors relevant to the public interest of Permian's listeners. Whatever it decides—whether to congratulate Permian on its resistance to local law (which is, in fact, unthinkable)—or whether to criticize Permian's broadcasting of Roberts' programs and so secure a cessation²⁸—or whether to deny renewal—there can be no conflict with New Mexico's action within the meaning of the preemption decisions of this Court, for the federal interest is that of the listening public and New Mexico's law serves a different interest, i.e., the health of its citizens. Where the state and federal interests are different they may both validly cover the same interstate operation. *Union Brokerage Co. v. Jensen*, 322 U.S. 202; *Auto Workers v. Wisconsin Board*, 336 U.S. 245, 253; *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440; cf. *United*

²⁸ Such possible coincidence of result with the result of New Mexico's law, if it were considered as a present fact, would not require preemption. *California v. Zook*, 336 U.S. 725; *Gilbert v. Minnesota*, 254 U.S. 235; *Asbell v. Kansas*, 209 U.S. 251.

States v. R.C.A., 358 U.S. 334.²⁹ Federal law in *Union Brokerage Co.* permitted an exclusively foreign commerce customs broker to do business under a federal license for the protection of the interests of importers and exporters. Nevertheless the state validly could prohibit the broker from doing the same business unless licensed by the state in protection of its citizens dealing with the broker. In *Huron*, a state requirement in the interests of public health necessitating structural alterations in interstate ships so as to abate smoke was held not preempted by federal structural standards designed to further the federal interest in safety of navigation, even though the vessels were operating under federal licenses. Decision of no preemption here is well within *Union Brokerage Co.* and *Huron*. Such decision is even further within the Court's decisions of no preemption in the cases of asserted federal-state conflict arising under the very Act with which we are concerned. *Regents v. Carroll*, 338 U.S. 586; *Radio Station WOW v. Johnson*, 326 U.S. 120; and *Kroeger v. Stahl*, 248 F(2d) 121 (C.A. 3, 1957). In all of these cases state action in protection of its own interests conflicted with Commission approvals or approval.

²⁹ If New Mexico's interest and the Federal interest here were the same, the validity of New Mexico's action would still be well within the Court's decisions holding State action not preempted. See, e.g., *Reid v. Colorado*, 187 U.S. 137 (state law punishing transportation of livestock without certificate of freedom from disease held not preempted because federal statute punished only transportation of cattle known to be diseased). The case, which obviously goes much further than a decision of no preemption would require here (on the assumption of identical state-federal interests) was cited with approval in *Kelly v. Washington*, 302 U.S. 1, 10-11.

conditions premised on the federal public interest. In all of them, the state action was validated.³⁰

The *Regents* and *Radio Station WOW* cases involved damages for breach of contract and fraud, respectively. Apparently, because of those cases, the United States suggests that Congress did not preempt traditional state powers such as those exercised in contract, torts, and fraud, and ordinary criminal jurisdiction, as distinguished from state powers exercised in the passage of health and public welfare laws. The reason for the non-preemption of the "traditional" state powers and remedies is, according to the United States, that Congress made no specific provision in the Act as to them. Congress also made no specific provision in the act as to price advertising of eyeglasses, or any kind of price advertising, or any kind of advertising. Beyond that we know of no decision or doctrine in Constitutional law upon which such a distinction between valid and invalid state action could be based. And the Government cites none.

The concession made by the United States as to the non-preemption of state cases of fraud practically concedes this case. The New Mexico statute is essentially

³⁰ The no preemption decision in *Radio Station WOW* might well have meant the termination of a broadcasting station, as the Court expressly recognized (326 U.S. at pp. 131-132). Here it is questionable whether even Roberts' advertising is lost to Permian, or radio in general. Perhaps, it is unnecessary to state that *Benanti v. United States*, 355 U.S. 96; *Western Union Telegraph Company v. Broglie*, 251 U.S. 315; *Postal Telegraph-Cable Co. v. Warren Goodwin Lumber Co.*, 251 U.S. 27, and *Charleston & Western Carolina Railway Co. v. Farnville Co.*, 237 U.S. 597, are all inapposite since they presented conflicts between state and federal actions in circumstances not present here.

directed at fraud, albeit in a wise and sophisticated way. See the discussion at p. 12, *supra*.

The United States also suggests a distinction between traditional remedies such as judgment for damages and, it may be, criminal conviction on the one side and injunctions on the other. The former are valid; and the latter are preempted—according to the suggestion of the United States. Again, we know of no law to support such a distinction, and the United States cites none. If New Mexico's law is valid, there is no reason for New Mexico not to use such remedy as is deemed most appropriate and most humane (as distinguished from a criminal conviction of Permian and its officers, for example) in the circumstances. The use of an injunction against a radio licensee does not of itself mean preemption. The very action upheld in *Station WOW* was a state injunction against a radio licensee. Moreover, the injunction, at least in the form of a Federal Trade Commission cease and desist order, has been a familiar weapon in the common state-federal effort against deceptive advertising. Cf. *In the Matter of Drug Research Corporation*, Federal Trade Commission, Docket No. 7179, in which the Hearing Examiner has ruled that a state criminal prosecution for the same deceptive advertisements is not preempted by a Federal Trade Commission cease and desist proceeding.

Finally, the United States suggests that affirmance here means that radio listeners in Texas as well as New Mexico will be deprived of listening to Roberts' price advertising of glasses. That they will be so deprived is doubtful. At least until stopped by Texas, Roberts can advertise on the nearby Texas radio station KTFO, at Seminole. Broadcasting Yearbook Issue, 1963, p. B-185. But reversal as to Permian here, would surely

mean that the laws of twelve states on optometric advertising which specifically apply to radio,³¹ and the laws of twenty-one states on the same subject which apply to "any person" and hence to radio,³² will be invalidated in their application to the radio media. Yet, invalidation by preemption would have to result in a discrimination in favor of radio (and television) as against newspapers and other advertising media. In any conceivable intent of Congress, there is no warrant for such a result.

Rather plainly, there is no preemption.

³¹ Cal. Ann. Code, Bus. and Professions Sec. 3000 (1962); Fla. Stat. Ann. sec. 463.11; N.H. Rev. Stat. sec. 327.20; N.J. Stat. Ann. sec. 45:12-11; N.C. Gen. Laws sec. 90-124; N. Dak. Cent. Code sec. 43-13-29 (but media not to be held liable); Okla. Stat. tit. 59, secs. 585, 943 (1961) (but media not to be held liable); Ore. Rev. Stat. sec. 683.140 (6); Pa. Stat. Ann. tit. 63, 237 (Purdon); S. Dak. Code sec. 27.0707 (1960 Supp.); Tenn. Code Ann. secs. 63-815, 63-822, 63-1404; Wash. Rev. Code Ann. sec. 18.53.140.

³² Ark. Stat. sec. 72-815 (1957 Repl.); Cal. Ann. Code, Bus. and Professions sec. 3129 (1962); Colo. Rev. Stat. sec. 102-2-17 (1953); Fla. Stat. Ann. sec. 463.14; Ind. Stat. secs. 63-1018a, 1019 (Burns 1961); Kan. Gen. Stat. sec. 65-1510; Ky. Rev. Stat. sec. 320.300; La. Rev. Stat. sec. 34.1063; Mass. Gen. Laws Ann. ch. 112, sec. 73 (A); Mich. Laws Ann. sec. 14.648 (1956); Mont. Rev. Codes sec. 66-1302 (1947); Neb. Rev. Stat. sec. 71-167 (1958); N.M. Stat. Ann. sec. 67-7-13; Ore. Rev. Stat. secs. 683.140, 683.990; R.I. Gen. Laws sec. 5-35-22 (1956); S.C. Code of Laws sec. 56-1075; Texas Civil Stat., art. 4565g; Va. Code sec. 54-396 (1950); Wash. Rev. Code Ann. sec. 18.53.140; Wise Stat. Ann. sec. 153.10; Wyo. Stat. sec. 33-301.

II.

**NEW MEXICO'S PROHIBITION OF PRICE ADVERTISING
OF EYEGLASSES AS APPLIED HERE DOES NOT
VIOLATE THE COMMERCE CLAUSE**

The argument by appellants (their brief, pp. 7-20) takes many directions not warranted by the facts of this case. We start, therefore, with what New Mexico has not done.

A. What New Mexico Has Not Done

New Mexico has not sought to isolate herself from her sister states either by economic barrier (cf. *Baldwin v. G.A.F. Seelig*, 294 U.S. 511)³³ or otherwise (cf. *Edwards v. California*, 314 U.S. 160). No one, whether a resident of New Mexico or not, has been prohibited from buying the glasses sold by Roberts, and taking them into New Mexico. Cf. *Allgeyer v. Louisiana*, 165 U.S. 578; *Delamater v. South Dakota*, 205 U.S. 93, 102. On the record here there is no showing that Roberts makes any interstate sales across the state line into New Mexico, or that any such sales have been prevented, reduced, or hampered.

Since there is no showing to the contrary, it must be assumed on the record here that the revenues of appellants derived from advertising placed by Roberts, whatever those revenues may be, have not been reduced, and will not be if New Mexico's action is sustained. The burden in attacking New Mexico's action is on

³³ However, a state may in the economic interests of its local producers, validly adopt, so far as the Commerce Clause is concerned, stabilization schemes which seriously affect extensive areas of interstate Commerce. Cf. *Cities Service Gas Co. v. Peerless Oil*, 340 U.S. 179; *Parker v. Brown*, 317 U.S. 341; *Milk Board v. Eisenberg Co.*, 306 U.S. 349.

appellants; and for all that appears Roberts has, and can accommodate his advertising in New Mexico, to New Mexico's law.³⁴

**B. What New Mexico Has Done Does Not Violate the
Commerce Clause**

New Mexico, in an indisputably valid exercise of her police power so far as Due Process is concerned (see the *Williamson* and other decisions of this Court, *supra*, at p. 12), has enacted a general statute applicable equally and without discrimination to all within her borders, whether engaged in interstate commerce or not. In doing so, New Mexico has sought to meet a local problem in very much the same way that most other states have (see pp. 22-23, *supra*).

Here enforcement of New Mexico's law has been by injunction—a remedy which cannot be said to be either generally inappropriate,³⁵ or, even less so, inappropri-

³⁴ The record shows no discrimination between interstate and intrastate commerce; and none is charged. Appellants do charge discrimination between them and radio stations located outside Texas. They do not show, however, that there are any such stations broadcasting Roberts' advertisements into New Mexico. In any case, such discrimination, if there be any, is not prohibited by the Constitution. See *Packer Corporation v. Utah*, 285 U.S. 105, 109, which decision directly contradicts *Little v. Smith*, 124 Kan. 237, 257 P. 959 (1929) relied on by appellants.

³⁵ A number of states specifically provide for injunctions against violation of visual care statutes:

Ark. Stat. sec. 72-818 (1957 Repl.); Cal. Ann. Code, Bus. and Professions sec. 3131 (1962); Colo. Rev. Stat. sec. 102-2-21 (1953); Fla. Stat. Ann. sec. 463.19; Ind. Stat. sec. 63-1019 (Burns 1961); Ky. Rev. Stat. sec. 320.370 (1962); N.M. Stat. Ann. sec. 67-26-24; Tenn. Code Ann. sec. 63-1404; Utah Code Ann. sec. 58-1-37 (1953); Wash. Rev. Code Ann. sec. 18.34.150; Wis. Stat. Ann. sec. 153.10 (enjoinable as a nuisance).

ate in the particular circumstances of this case. The injunction is directed solely against appellants who are resident within New Mexico, and prevents them only from accepting or publishing within New Mexico price advertising by Roberts. In other words, the injunction by its express terms is "to apply exclusively to operations wholly within the State . . . although those operations are" in part "interstate in nature." See *Aero Transit Co. v. Com'rs.*, 322 U.S. 495, 502; *Buck v. California*, 343 U.S. 99, 102; *Packer Corporation v. Utah*, 285 U.S. 105, 111. So far as the injunction is directed against "accepting" advertising from Roberts, New Mexico's prohibition regulates contracts locally made, whether or not Roberts telephones his advertisements from Texas as appellants assert or comes into New Mexico to offer them. Essentially such contracts are intrastate in nature. *Hooper v. California*, 155 U.S. 648, 654; *Delamater v. South Dakota*, 205 U.S. 93, 100-101.³⁶

At the same time, appellants are admittedly engaged in both intrastate and interstate commerce, with how much of each not shown. Permian's broadcasts cover a local area surrounding Hobbs, and that area is divided between New Mexico and Texas. Head's interstate operation is not shown to be anything more than the minimal amount suggested by the record. In the absence of proof to the contrary by those who carry the burden of showing an invalid application of New Mexico's law, that part of Head's operation which is

³⁶ This is not to say, of course, that for other purposes and in other circumstances not present here, such contracts could not be part of the flow of interstate commerce. Cf. *Lorain Journal v. United States*, 342 U.S. 143.

in interstate commerce is safely assumed on the record here to be insignificant.

The injunction, as an effect of its application to "accepting" the advertisements by Roberts, and even more so as an effect of its application to "publishing" the advertisements by Roberts, stops the intrastate broadcasting as well as an interstate broadcasting of those advertisements into that part of the local area which is in Texas, and stops the carrying of the Roberts advertisements in the Hobbs Flare in New Mexico, as well as in that part of the local area which is in Texas, and to some undefined, but obviously small extent, in other states. Just how much publication, which is at least technically of an interstate nature, is stopped by the injunction does not appear. Appellants have not shown that Roberts places a forbidden advertisement more than once a week, or even once a year. Neither have they shown the magnitude of the forbidden advertisements. They cannot be assumed to loom large in appellants' operations; and on the record here, the forbidden advertisements considered as part of the national commerce are rather clearly *de minimis*.

So far as appears here, the injunction will not result in a net loss to the national commerce. On the contrary, the substitution of allowable advertisements for those forbidden will be beneficial and cleansing to interstate commerce, for the New Mexico statute is essentially directed to the protection of the public (see p. 12, *supra*).

As we have already shown (pp. 16 to 18; *supra*), the injunction does not, under the decisions of the Court, unconstitutionally affect such uniformity as the Commerce Clause requires in this field.

Viewed from the viewpoint of New Mexico, that State has legitimate interests to be protected by the injunction. While New Mexico has not sought to forbid the purchase of glasses sold by Roberts, she has a legitimate interest in protecting her citizens from the advertisements which characterize the business of the quack and charlatan, at least so far as they are published and broadcast within her own borders. And New Mexico has a further interest in preventing so far as she can the deleterious and discouraging effect upon the maintenance of professional standards within her own borders that Roberts' non-professional advertisements have when published and broadcast in New Mexico. Cf. *Carter v. Virginia*, 321 U.S. 131 (Virginia's regulation of interstate traffic through her state to prevent violation of her own liquor law held valid).

Each case in relation to the Commerce Clause must be decided on an evaluation of the circumstances presented. The foregoing are the circumstances here. They compel a determination of validity. New Mexico's action, otherwise a valid exercise of the police power in amelioration of a local problem, is applied evenhandedly to intrastate commerce and interstate commerce alike, and is not shown to conflict with federal law or prejudice such uniformity as may be required. Such state action is valid—even though applied to the interstate operations of a business engaged in both interstate and intrastate operations,³⁷ which is the fact

³⁷ *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (Detroit's smoke ordinance upheld as applied to interstate shipping); *Buck v. California*, 343 U.S. 99 (Local drivers' permit requirements upheld as applied to through foreign commerce); *Brnard v. Alexandria*, 341 U.S. 622 (Local ordinance regulating door to door solicitation upheld as applied to solicitors for national magazines);

here—even though applied to a purely interstate business,³⁸ which is not the fact here—even though the state action by its very terms can only be applicable to interstate commerce,³⁹ which is not the fact here—and even when large areas of the national commerce are substantially affected,⁴⁰ which is not the fact here. The validity of New Mexico's action is all the more certain

mostly engaged in arranging interstate trips, upheld) ; *S.C. Hary. v. California v. Zook*, 336 U.S. 725 (state regulation of travel bureau, *Barnewell Bros.*, 303 U.S. 177 (state weights and widths statute upheld as applied to interstate commerce) ; *Packer Corporation v. Utah*, 285 U.S. 103 (state prohibition of advertising of tobacco products upheld as applied to national advertising concern) ; *Railway Express v. New York*, 336 U.S. 106 (local ordinance prohibiting advertisements for others on trucks upheld as applied to interstate trucks).

³⁸ *Aero Transit Co. v. Com'rs.*, 332 U.S. 495 (state tax on trucks using state highways as applied to a trucking concern engaged solely in interstate trucking) ; *California v. Thompson*, 313 U.S. 109 (state regulation of persons arranging for motor vehicle transportation upheld as applied to a person who arranged interstate trip ; and *DiSanto v. Pennsylvania*, 273 U.S. expressly overruled) ; *Union Brokerage Co. v. Jensen*, 322 U.S. 202 (state licensing as applied to customs-broker engaged exclusively in foreign commerce).

³⁹ *Carler v. Virginia*, 321 U.S. 131 (state regulation of interstate trucking of liquor through the state upheld) ; *Clason v. Indiana*, 306 U.S. 439 (state prohibition against interstate carriage of animal corpses on its highways upheld) ; *Asbell v. Kansas*, 209 U.S. 251 (state regulation of cattle importation from out of the state upheld).

⁴⁰ For example, *Parker v. Brown*, 317 U.S. 343 (California's stabilization's scheme affecting most of the national commerce in raisins upheld) ; and *Milk Board v. Eisenberg Co.*, 306 U.S. 349 (stabilization scheme of large milk-exporting state upheld as applied to company which bought milk solely for interstate export).

because the interstate commerce it affects is local in character and confined to Hobbs and its outlying area which is only fortuitously divided by a state line. See *Buck v. California*, 343 U.S. 99, 102 (Local ordinance requiring drivers' permit upheld as applied to taxicabs engaged in through foreign commerce); cf. *Omaha Street Ry. v. Interstate Commerce Commission*, 230 U.S. 324, 336 (Interstate Commerce Act held not to apply to a street railroad running between the two neighboring communities separated by a state line).⁴¹

In some of the cases we have cited, the state statute was expressed in terms of prohibition; and in others in terms of regulation. The difference is more semantic than real for, as the Court has observed, "regulation necessarily has elements of prohibition." See *Breard v. Alexandria*, 341 U.S. 622, 641.

Williamson v. Lee Optical Co., 348 U.S. 483, which upheld Oklahoma's prohibition of all optometric advertising, supports a determination here of no violation of the Commerce Clause. The complainants in *Williamson* alleged that they advertised "in newspapers,

⁴¹ In view of the Court's decisions upon which we rely, *Little v. Smith*, 124 Kan. 237, 257 Pac. 959 (1929), and *State v. Salt Lake Trip. Pub. Co.*, 68 Utah 87, 249 Pac. 479 (1926) (state prohibitions of cigarette advertising held invalid as applied to large local publishers) differ from this case on their facts and are wrong in principle. *Post Print'g. & Publishing Co. v. Brewster*, 246 Fed. 321 (D.C. Kans., 1917) deals with the problem of a state advertising prohibition as applied to an out-of-state publisher. The question is not presented here. Appellants also rely on *Western Union Tel. Co. v. Foster*, 247 U.S. 105, and *Crutcher v. Kentucky*, 141 U.S. 47. Those cases invalidated state regulations which would basically change the whole of large interstate operations. No such facts are present here.

magazines, by radio, television and by other media of publication" (Record in *Williamson*, Nos. 184, 185, October Term, 1954, p. 6) and on that basis expressly claimed violation of the Commerce Clause (*id.*, p. 10). The evidence at trial showed advertising by newspaper and radio (*id.*, pp. 211, 218). And in this Court, the interstate commerce issue so raised was briefed by the parties, and by us as *amicus curiae*. See *Williamson*, Reply Brief for Attorney General of Oklahoma, pp. 18 to 19; Brief for Lee Optical Co., pp. 71 to 75; Brief for the American Optometric Association, Inc., as *amicus curiae*, pp. 44 to 47. The Court's opinion made no express reference to the interstate commerce point. However, in the light of the persuasive nature of the decisions on which we rely, the Court's concluding statement in *Williamson* (348 U.S. at 490) that it saw "no constitutional reason" for invalidating Oklahoma's action takes an added significance in its application to the interstate commerce issue which was unquestionably presented for decision.

As our country increases in population and as transportation and intercommunication are eased and speeded, the activities of our people become more and more interdependent and complex. So the Commerce power of Congress grows; and the problems of scarcely any hamlet are beyond its reach. At the same time, the ability of Congress to cope with the essentially local problems of our hamlets, communities, and states is limited, and less and less adequate for the magnitude of the task. Doubtless for reasons such as these, the Court's decisions under the Commerce Clause from *Cooley v. Board of Port Wardens*, 12 How. 299, to date have been increasingly permissive of non-discriminatory state action taken in the absence of conflicting

federal law. Until Congress acts, evils, abuses, and problems connected with both intrastate and interstate commerce would go unremedied and unresolved, if the states could not act. And so it is here. It is doubtful that Congress will ever legislate specifically with respect to optometric advertising, or professional advertising. At least until Congress does, the action of New Mexico under review here should be permitted to stand as being rationally calculated to aid enforcement within New Mexico of her constitutionally valid plan for the better health of her people, and this applies with equal force to other statutes relating to medicine, dentistry, and other health professions.

III.

NEW MEXICO'S PROHIBITION OF PRICE ADVERTISING AS APPLIED HERE DOES NOT VIOLATE THE FIRST AMENDMENT

Appellants' jurisdictional statement presented no question as to the First Amendment.⁴² However, since the Court may consider the issue we cover it here.

New Mexico's action is directed to the purely commercial advertising offered by Roberts.⁴³ Nothing else is presented here.⁴⁴ In the circumstances of this case,

⁴² In the jurisdictional statement and in the lower courts, appellants urged deprivation of property without due process of law, which they now say is the same as infringement of a free press. Brief for the Appellants, p. 34 n. 18.

⁴³ Contrast *Near v. Minnesota*, 283 U.S. 691, which concerned an injunction against dissemination of opinion.

⁴⁴ So the Court is not concerned in this case with advertising that mixes merchandising with opinion. See *Valentine v. Chrestensen*, 316 U.S. 52, 55; and cf. *Hoffman v. Perrucci*, 117 F. Supp. 38 (E.D. Penn., 1953), app. dismissed 222 F.(2d) 709 (C.A. 3, 1955); *United States v. American Machinery Co.*, 116 F. Supp. 160 (E.D. Wash., 1953); *People v. American Automobile Insurance Company*, 132 Cal. App. (2d) 317, 282 Pac. (2d) 559 (1955).

such commercial advertising is not protected by the First Amendment. *Valentine v. Chrestensen*, 316 U.S. 52; see *Martin v. City of Struthers*, 319 U.S. 362 n. 1; *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 110-111; *Jamison v. Texas*, 318 U.S. 413, 417; *Town of Green River v. Fuller Brush Co.*, 65 F(2d) 112 (C.A. 10, 1933); *Pollak v. Public Utilities Commission*, 191 F(2d) 450, 457, (C.A. D.C. 1951) rev'd on other grounds, 334 U.S. 451.⁴⁵ There is no question here of a tax on commercial advertising that could destroy or is designed to destroy the business of Head and Permian so as to prevent their dissemination of public opinion. Cf. *Grosjean v. American Press Co.*, 297 U.S. 233.

Since there is no First Amendment protection, any question as to prior restraint by injunction is beside the point. Indeed, if the First Amendment had some application here, it would be very late in the day to urge that the advertising practices which characterize the quack and the charlatan (See *Semler v. Dental Examiners*, 294 U.S. 608, 612) cannot be enjoined. There is the whole of the familiar history of cease and desist orders by the Federal Trade Commission against deceptive and misleading advertisements. See, e.g. *E. F.*

⁴⁵ If the First Amendment were in any way applicable to the purely commercial advertisements of Roberts, a balancing of the interests of appellants against those of New Mexico would lead to affirmance here. The interests of appellants are confined to financial interests, and even those interests are not shown to be hurt. New Mexico's interest is not less than the health of the residents of her State. Further, New Mexico represents here the identical interests of many of her sister states (see pp. 22-23 *supra*) who have met the same problems of health by similar laws directed against optometric advertising.

Drew & Co. v. Federal Trade Commission, 235 F(2d) 735 (C.A. 2, 1956). Even where opinion or art is concerned, and so long as other constitutional requirements are met, there is "no absolute freedom to exhibit, at least once, any and every kind of motion picture." *Times Film Corp. v. Chicago*, 365 U.S. 43, 46. And like the anti-trust injunction upheld against the newspaper in *Lorain Journal v. United States*, 342 U.S. 143, 155, "the injunction" here "applies to a publisher what the law applies to others." In short, the fact that appellants in other aspects of their business disseminate opinion does not confer upon either of them a right to be "free from state regulation or free to manage essentially local aspects of its business as it pleases." Cf. *Panhandle Co. v. Michigan Comm.*, 341 U.S. 329, 337; *Scripps-Howard Radio v. Comm'n.*, 361 U.S. 4, 14.

CONCLUSION

The judgment of the Supreme Court of New Mexico should be affirmed.

Respectfully submitted,

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APPENDIX

*Section 67-7-13, New Mexico Statutes Annotated, 1953
Compilation:*

"67-7-13. Offenses-Penalties.—Each of the following acts on the part of any person shall constitute a misdemeanor and shall be punished by a fine of not less than \$50.00 nor more than \$200.00 or imprisonment in the county jail for not less than 30 days nor more than six (6) months, or both such fine and imprisonment for the first offense, and for a second offense a fine of not less than \$200.00 nor more than \$500.00, or imprisonment in the county jail for not less than 90 days nor more than (1) year, or both such fine and imprisonment. All fines thus received shall be paid into the common school fund of the county in which such conviction takes place.

(a) The practice of optometry, or an attempt to practice optometry without a duly authorized certificate of registration as an optometrist issued by the New Mexico state board of optometry as provided in this act (67-7-1 to 67-7-14), and signed the president and secretary of said board.

(b) Permitting any person in one's employ, supervision or control to practice optometry unless that person has a certificate of registration, as provided in this act.

(c) Obtaining, or attempting to obtain, a certificate of registration to practice optometry unless that person has a certificate of registration, as provided in this act.

(d) The making of a willfully false oath or affirmation whenever an oath or affirmation is required by this act.

(e) Falsely impersonating an optometrist of like or different name.

(f) By selling or fraudulently obtaining any optometry diploma, license, record or certificate or aiding or abetting therein.

(g) Using in connection with his name any designation tending to imply that he is a practitioner of optometry, if not the holder of a certificate of registration under the provisions of this act.

(h) Practicing optometry during the time his certificate of registration shall be suspended or revoked.

(i) Either in person or by or through solicitors or agents giving or offering to give to any person eyeglasses, spectacles or lenses, either with or without frames or mountings, as a premium or inducement for any subscription to any book, set of books, magazines, magazine, periodical or other publication, or as a premium or inducement for the purchase of any goods, wares or merchandise.

(j) Except licensed and registered optometrists and licensed and registered physicians and surgeons, having possession of any trial lenses, trial frames, graduated test cards or other appliances or instruments used in the practice of optometry for the purpose of examining the eyes or rendering assistance to anyone who desires to have an examination of the eyes, or selling lenses or duplicating or replacing broken lenses in spectacles or eyeglasses, except upon the prescription of a regularly licensed and registered optometrist or physician and surgeon.

(k) The making of a house to house canvass either in person or through solicitors or associates for the

purpose of selling, advertising or soliciting the sale of eyeglasses, spectacles, lenses, frames, mountings, eye examinations or optometrical services.

(l) The peddling of eyeglasses, spectacles or lenses from house to house or on the streets or highways, notwithstanding any law for the licensing of peddlers.

(m) Advertising by any means whatsoever the quotation of any prices or terms on eyeglasses, spectacles, lenses, frames or mountings, or which quotes discount to be offered on eyeglasses, spectacles, lenses, frames or mountings on which quotes 'moderate prices,' 'low prices,' 'lowest prices,' 'guaranteed glasses,' 'satisfaction guaranteed,' or words of similar import.

(n) The violation of any of the provisions of this act for which the penalty has not been elsewhere provided in this act."

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In The

Supreme Court of the United States

OCTOBER TERM, 1962

No. 392

**AGNES K. HEAD, d/b/a LEA COUNTY PUBLISHING
CO., and PERMIAN BASIN RADIO CORPORATION,**

Appellants,

Against

**NEW MEXICO BOARD OF EXAMINERS
IN OPTOMETRY,**

Appellee.

**ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW MEXICO**

BRIEF OF APPELLEE

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In The

Supreme Court of the United States

OCTOBER TERM, 1962

No. 392

**AGNES K. HEAD, d/b/a LEA COUNTY PUBLISHING
CO., and PERMIAN BASIN RADIO CORPORATION,**

Appellants,

Against

**NEW MEXICO BOARD OF EXAMINERS
IN OPTOMETRY,**

Appellee.

**ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW MEXICO**

BRIEF OF APPELLEE

SUMMARY OF ARGUMENT

A local police power enactment, not discriminatory as against interstate commerce, nor an undue burden thereupon, is here sought to be upheld. One may admit that appellants each are engaged in interstate commerce, yet the application of Sec. 67-7-13, N.M.S.A., 1953 Compilation to them, does not constitute a regulation of interstate commerce within the meaning of the Constitution.

Huron Portland Cement Co. v. City of Detroit, 362 U. S. 440 (1960).

Appellant Permian can claim no shield from its duty to obey the law of this state by virtue of the Federal Communications Act. True, there are statements by this Court to the effect that the act constitutes a complete scheme for the regulation of radio broadcasting. But such statements must be viewed in the light of the factual background involved. Insofar as the issuance of licenses to broadcast is concerned, and the assignment of frequencies that the broadcaster may use is concerned, there is no room for state regulation. It is in this sense that occupation of the field by Congress has occurred. Nonetheless, it is clear that there remains an area within which the state may enforce its law. **Radio Station WOW, Inc., v. Johnson**, 326 U. S. 120 (1945). And a proper balancing of the need for local regulation pertaining to so precious a thing as human eye sight, as against uniformity of regulation of those matters of national concern, calls for an affirmance.

Appellants are not deprived of their property without due process of law, nor have they been denied the equal protection of the laws. **Williamson v. Lee Optical of Oklahoma, Inc.**, 348 U. S. 483 (1955). By the same token, no deprivation of privileges and immunities is involved.

ARGUMENT

POINT I

The restraint of appellants under Sec. 67-7-13, N. M. S. A., 1953 Comp., is not an undue burden upon interstate commerce.

A case which pointedly illustrates this problem is **Huron**

Portland Cement Co. v. City of Detroit, 362 U. S. 440 (1960). Appellant maintained a fleet of steamships operating in interstate commerce upon the Great Lakes. On occasion, some of the vessels emitted smoke in excess of the standards permitted under the Detroit Smoke Abatement Code. Alterations in the structure of the ships would have been required in order to effect compliance. Two defenses were interposed by the shipowner to criminal proceedings brought against it: (1) Since the ships were regulated and licensed in accordance with standards imposed by Congress, Detroit couldn't impose additional or inconsistent standards, and (2) even if Congress had not pre-empted the field, still in all the ordinance materially affected interstate commerce in matters where uniformity of regulation was necessary. After reviewing the problem from an historic aspect, this Court said:

"The ordinance was enacted for the manifest purpose of promoting the health and welfare of the city's inhabitants. Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government."

and continued by saying:

"In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when conferring upon Congress the regulation of commerce . . . never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of

their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution."

and concluded:

"The claim that the Detroit ordinance, quite apart from the effect of federal legislation, imposes as to the appellant's ships an undue burden on interstate commerce needs no extended discussion. State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand."

Broadcasting or newspaper circulation certainly cannot be matters where there should be any greater degree of uniformity of regulation than interstate movement of ships. The Detroit ordinance did not exclude the vessels from the harbor. It simply prohibited the emission of excessive amounts of smoke while there. True, structural alterations of the ships were necessary, and to that extent, there easily could have been a variance between Detroit's requirements, and those of other ports. Hence, some disruption of uniformity was inherent. The overriding factor, however, was the need to prevent pollution of the air, a matter of local concern. So here, New Mexico does not exclude advertising by optometrists. It simply forbids reference to prices. That Texas may not forbid price advertising by optometrists presents a far less chance of disruption of national uniformity than was true in Huron Portland. Here, the overriding factor is the need to protect the treatment of the human eye from the adverse affects of price advertising.

Indeed, appellants are less likely to be subject to different local standards than were the shipowners in **Huron Portland**. Appellants have but to refrain from promulgating price advertising by optometrists in New Mexico. The shipowners, because their vessels docked in ports in different states, could well have been subjected to varying standards relative to smoke abatement.

In **Panhandle Eastern Pipe Line Co. v. Michigan Pub. Serv. Comm.**, 341 U. S. 329 (1951), this Court sustained the power of the state to exact a certificate of public convenience from appellant, who was engaged in transporting natural gas from Texas, Oklahoma and Kansas, before appellant could sell directly to industrial consumers at Dearborn, Michigan. This was clearly interstate commerce, yet the Court's reasoning was that the sales were essentially local in aspect and hence subject to state regulation without infringement of the commerce clause. The power to require a certificate of public convenience and necessity comes close to being the power to prohibit altogether. New Mexico does not seek any such drastic action.

Reference to certain fundamentals at this point is not amiss. Congress will not be deemed to have intended to strike down state health legislation unless its purpose to do so is very clear, or unless there is an actual conflict between the two laws. Absent a conflict, a residuum of power rests in the states to govern matters of local concern which in a measure affect interstate commerce, or even regulate it. This is particularly so as to matters which because of their number and diversity, may never be dealt with by Congress. Reconciliation of the conflicting claims of state and national power can only be attained by appraisal of the competing demands of state and nation.

Southern Pacific Company v. State of Arizona, 325 U. S. 761 (1945), and cases cited.

Here, legislation by the state concerning public health is concerned. The regulation of the practice of optometry, as well as of medicine, dentistry, etc., are matters which may never receive full treatment by Congress. Traditionally these are matters left to the states. There is no need for uniformity of regulation of advertising by optometrists by a single national authority. Hence, the argument that an unreasonable burden upon interstate commerce has occurred disappears.

Let one thing in this case be made crystal clear. New Mexico is not enjoining or regulating any acts by anyone outside its borders. Appellants indicate they believe otherwise, and in doing so, lay great stress upon **Baldwin v. G. A. F. Seelig, Inc.**, 294 U. S. 511 (1935), wherein New York's attempt to prohibit the introduction into it of milk purchased in Vermont was struck down as an undue burden on interstate commerce, where New York sought to impose its minimum milk price statutes even though the milk was purchased in Vermont. Thus, New York sought to project its statutory price scheme into a neighbor state. Both appellants are New Mexico residents and are amenable to its laws. It is advertising promulgated in New Mexico which is the subject of the injunction. (R. 21). Roberts is free to originate any kind of advertising in Texas that he may choose, even though subsequently heard or read in New Mexico. If New Mexico, by any method, sought to control advertising promulgated in Texas, then **Baldwin** would be applicable, but such is not the case here.

Perhaps the most succinct explanation of **Baldwin** is to be found in this Court's opinion in **Henneford v. Silas**

Mason Co., Inc., 300 U. S. 577 (1937), wherein at 585 it was said:

"The same statute provided that when milk from another state had been brought into New York, the dealer should be prohibited from selling it at any price unless in buying the milk from the out-of-state producer he had paid the price that would be necessary if he had bought within the state. New York was attempting to project its legislation within the borders of another state by regulating the price to be paid in that state for milk acquired there. She said in effect to farmers in Vermont: Your milk cannot be sold by dealers to whom you ship it in New York unless you sell it to them in Vermont at a price determined here."

In sum, New York sought to concern itself with prices for milk purchased in Vermont, a form of economic barrier, but New Mexico has no concern whatsoever with advertising originating in Texas.

In **Buck v. California**, 343 U. S. 99 (1952), appellants had been arrested for operating taxicabs without a permit. The operations involved transportation of passengers from the Republic of Mexico across unincorporated areas of San Diego County. A local ordinance required a permit for transportation across the county's unincorporated areas. This Court sustained the regulation, holding that taxi operations are local business, the regulation of which has been left to the states, even if appellants were engaged in foreign commerce. There is all the more reason for upholding the local regulations involved in this case, since they are designed for the protection of human eye sight.

Nor does there appear to be any greater protection accorded by this Court to interstate advertising, simply by virtue of the fact of advertising. See **Railway Express Agency, Inc. v. New York**, 336 U. S. 106 (1949), where local prohibition of a certain class of advertising on trucks was sustained even though the trucks moved in interstate commerce.

A case in point is that of **Bedno v. Fast**, 6 Wisc. 2d 471, 95 N. W. 2d 396 (1959), in which this Court denied certiorari at 360 U. S. 931.

The statute in question prohibited price advertising by any person as to glasses, optometric services, lenses, frames etc. Plaintiffs, who were manufacturers and merchants of optical goods, sought an injunction and declaratory judgment in the Wisconsin courts against the defendant members of the Board of Examiners in Optometry. Plaintiffs challenged the constitutionality of the statute. They also argued the statute did not apply to them since they did not practice optometry and only applied to practitioners. Plaintiff's advertising contracts were made in Illinois, and the ads were placed in newspapers from the Chicago office. Ads were also placed in Wisconsin. All parties apparently conceded that the advertising was truthful.

Dealing with the question of interstate commerce, the Court at pages 400-401 said:

"If plaintiff's business, although in interstate commerce, has incidents and requires activities within the state intimately related to local welfare, then those incidents and activities are subject to state regulation under the police power, unless congress has, by appropriate legislation, pre-empted the field with reference thereto."

"All of the authorities relied upon by plaintiffs deal with false representations in advertising relating to optical goods. None of them involve truthful advertising of prescription eyeglasses. Since the prohibition of such truthful advertising is a proper exercise of the state's police power, as pointed out above, and the federal government has clearly limited its control to the field of false advertising, sec. 153.10 Stats. is constitutional. There is nothing in the statute which is repugnant to or incompatible with the federal act."

In **Bedno**, interstate advertising was involved. It violated the Wisconsin act prohibiting such advertising. There was no federal act in conflict with the state legislation, and the latter was upheld as a proper exercise of the police power. The case is squarely in point, and demolishes the argument of appellants that the New Mexico legislation, so similar to that of Wisconsin, infringes upon interstate commerce.

Solomon v. City of Cleveland, 159 N. E. 121, (Ohio App., 1926) appeal dismissed 116 Ohio St. 739, 158 NE. 8, concerned the validity of an ordinance of the City of Cleveland, which prohibited the vending of any newspapers or other periodicals in the city which contained horse racing news. The Court stated that gambling was illegal, and that those who published such news were aiding and abetting in the crime. The Court quoted from the trial judge's opinion, p. 124, as follows:

"It is also urged that the ordinance would prohibit the lawful sale of newspapers published in other states, and thereby interfere with interstate commerce and thus violate the provision of the federal Constitution in relation thereto.

"To this I say it has been repeatedly held by the Supreme Court of the United States that legislation by one state, or a division thereof, to promote the moral welfare of its people, or to conserve their health, although such may in a measure interfere with interstate commerce, is not in violation of any provision of the federal Constitution."

Another case in point is **Ritholz v. Indiana State Board of Registration and Examination in Optometry**, 45 F. Supp. 423 (D.C. Ind., 1937). The Indiana Act prohibited any person from advertising discounts or from using such terms as 'moderate prices', 'low prices', 'guaranteed glasses', etc. in connection with the sale of glasses, lenses or frames. The federal court held the statute did not conflict with the interstate commerce clause. The Indiana act was strikingly similar to New Mexico's. The Court, as a part of its Conclusions of Law, stated that the statutes:

"... are each constitutional and valid and that said subsections and section, are not, nor are any of them, in conflict with Clause 3 of Section 8 of Article I of the Constitution of the United States."

The three cases of **State v. Salt Lake Tribune Pub. Co.**, 68 Utah 87, 249 P. 474 (1926); **Post Printing and Publishing Co. v. Brewster**, 246 F. 321 (D. C., Kan., 1917); and **Little v. Smith**, 124 Kan. 237, 257 P. 959 (1927) are accorded considerable weight by appellants. First, as appellants correctly point out, these cases involved the prohibition of cigarette advertising, and not a restriction upon the manner of advertising. Second, the three decisions are all out of harmony with this Court's ruling in **Railway Express Agency, Inc. v. New York**, *supra*, in regard to interstate commerce.

Western Union Tel. Co. v. Foster, 247 U. S. 105 (1918), cited by appellants, is distinguishable. State regulation of interstate utility service to its patrons was involved. It was apparently only suggested by the state that it got its power to regulate by virtue of its power over the public streets over or through which the telegraph lines were maintained. This was rejected. There appeared to be no specific police power objective in the state action. Furthermore, the **Foster** case appears to be out of harmony with **Panhandle Eastern Pipe Line Co. v. Michigan Pub. Serv. Comm.**, *supra*.

No one is seeking to limit what the citizens of New Mexico may do in Texas or any other state. They may travel to Texas to purchase eyeglasses from Roberts. Appellants express great alarm that this right is being curtailed. Aside from the fact that no resident of New Mexico is before this Court complaining of interference with this right, one wonders at the consequences of appellants' argument. For instance, gambling is illegal in New Mexico, **Sec. 40-22-1, N.M.S.A., 1953 Comp.**, yet we will concede the right of all and sundry to journey to Nevada to engage in gambling. But surely it could not be successfully contended that New Mexico could not prevent agents of Las Vegas gambling houses from soliciting business in New Mexico, or could not prevent advertising in New Mexico announcing, for example, the quality or stakes of the poker games.

Be that as it may, appellants cite **Allgeyer v. Louisiana**, 165 U. S. 578 (1897) as authority for this proposition. The case is not in point. For one thing, it does not rest upon any feature of interstate commerce. An act of the legislature condemned any act done within Louisiana to effect insurance on property in Louisiana, in any marine insurance company which had not fully complied with

state law. This Court viewed the statute as one which unduly curtailed freedom of contract under the fourteenth amendment, i.e., to contract outside the state for property insurance. 'If New Mexico made criminal the act of a New Mexico resident in buying, or contracting to buy, optometric goods out of this state, *Allgeyer* perhaps would be persuasive. But it is poles apart from the case at bar. The same can be said of *St. Louis Compress Co. v. Arkansas*, 260 U. S. 346 (1922).

Throughout their brief (see for example p. 15) appellants approach this case as if it were one dealing only with an article of merchandise, trade, or commerce. Far more is involved, to wit, the public health, as we shall hereafter elaborate. That the New Mexico statutes are directed at something vastly more important than articles of trade as such, is made clear by Sec. 67-7-14, N.M.S.A., 1953 Comp., providing:

'Nothing in this act (67-7-1 to 67-7-14) shall be construed as applying to physicians and surgeons duly authorized to practice medicine in the state of New Mexico, nor to persons selling spectacles or eyeglasses who do not represent themselves as being qualified to detect and correct ocular anomalies, and who do not traffic upon assumed skill in adapting lenses to the eyes.

It is not just a mere mercantile business that is regulated.

The cases treating of such concepts as 'pre-emption', 'occupancy of the field', the issue of 'federal-state conflict' and 'burden upon interstate commerce' are legion to say the least. But many of them contain a most helpful guide, namely, the likelihood or not of retaliatory measures by other states. For example, in *Edwards v. Cali-*

fornia, 314 U. S. 160 (1941) this Court was concerned with the likelihood of other states enacting laws prohibiting the transportation into them of indigent persons as did the California legislation, the result of which would have been nation-wide curtailment of commerce in passengers, and the erection of numerous barriers at the state level. In short, the very situation the commerce clause was designed to prevent. Here, the chances of retaliatory legislation are extremely remote. And even if Texas, or other states, enact legislation dealing with price advertising by optometrists, such could not adversely affect appellants, since they would not be amenable to the laws of any other state. What advertising they publish originates in New Mexico alone, and it is New Mexico's laws to which they are subject.

POINT II

Congress has not, by the Communications Act of 1934, 47 U.S.C.A., Secs. 151 et seq., so occupied the field as to prevent New Mexico's enjoining of Appellant Permian from disseminating price advertising by an optometrist.

What is the test for determining whether Congress has occupied the field? As late as 1960, in *Huron Portland Cement Co. v. City of Detroit* supra, this Court said:

"In determining whether state regulation has been pre-empted by federal action, the intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state."

Actual conflict with the law of the state is the criterion, and neither the appellants, nor the Solicitor General, point to an actual conflict. Indeed, they concede that room is left to the states for some action against radio broadcasters operating in interstate commerce. This "sword" cuts the other way, of course, and we must concede that in matters such as license issuance, or the assignment of broadcast frequencies, there is no room for state action.

Thus, we have presented a case where Congress has, to a limited extent, occupied the field, and we must address ourselves to the effect of the partial pre-emption. In *Kelly v. State of Washington*, 302 U. S. 1 (1937), a like problem was presented. This Court, speaking through Mr. Chief Justice Hughes, said:

"There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together."

Nowhere do appellants, or the Solicitor General, point to a provision in the Federal Communications Act whereby Congress has legislated on the subject of radio advertising by those engaged in professions dealing with the public health. There is an utter lack of that "... direct and positive ..." conflict that must obtain before the field is occupied.

Appellants, and the Solicitor General, seem to argue that because Congress has acted in many aspects of interstate broadcasting, there is no place for state action which bears upon advertising or program content. We submit this philosophy was rejected by the **Kelly** case.

It is clear that Congress, in enacting the Federal Communications Act, did not see fit to embark upon a program of censorship, or even to prescribe program content, or the nature and extent of advertising. On the contrary, the fundamental purpose of Congress, insofar as radio was concerned, was the allotment and regulation of frequencies by prohibiting their use except pursuant to license. **F.C.C. v. Sanders Bros. Radio Station**, 309 U. S. 642 (1940).

The case of **Radio Station WOW, Inc., v. Johnson** 326 U. S. 120 (1945) is of extremely great significance. The United States had, as here, filed a brief in response to this Court's request. The state court had decreed the retransfer of property used as a radio station, but conceded it had no jurisdiction over the transfer of the license itself, recognizing that as to the latter, sole jurisdiction reposed in the Federal Communications Commission. The Commission had approved the transfer of the license. Thus, the license and licensed facilities had been separated. In addition, the state court had decreed that the parties should do all things necessary to secure a retransfer of the license itself. As to this feature of the case, this Court held that such provision in the decree constituted an infringement upon the licensing system established by Congress. Hence this portion of the state decree was invalidated.

Returning to the question raised by that part of the state decree ordering retransfer of the licensed facilities, this Court said:

"A proper regard for the implications of the policy that permeates the Communications Act makes disposition of licensed facilities prior to action by the Communications Commission a subsidiary issue of the license question. We have no doubt of the power of the Nebraska court to adjudicate, and conclusively, the claim of fraud in the transfer of the station by the Society to WOW and upon finding fraud to direct a reconveyance of the lease to the Society. And this, even though the property consists of licensed facilities and the Society chooses not to apply for retransfer of the radio license to it, or the Commission, upon such application, refuses the retransfer. The result may well be the termination of a broadcasting station. The Communications Act does not explicitly deal with this problem, and we find nothing in its interstices that dislodges the power of the States to deal with fraud merely because licensed facilities are involved. The 'public interest' with which the Commission is charged is that involved in granting licenses. Safeguarding of that interest can hardly imply that the interest of States in enforcing their laws against fraud have been nullified insofar as licensed facilities may be the instruments of fraud." (Emphasis ours.)

We submit this language shows that Congress has not pre-empted the entire field. This Court pointed out how there is nothing in the act explicitly dealing with the problem, nor anything that prevented the states from acting to alleviate.

What are some of the implications of **Johnson** insofar as the case at bar is concerned? First, licensed facilities were the instruments of fraud, and yet a state decree was permitted to stand which ordered a retransfer thereof.

That could, as Mr. Justice Frankfurter in writing for the Court pointed out, **work a termination of the broadcasting station.** Yet the decree at bar is not so drastic. It prohibits a certain class of advertising in a certain manner and nothing more. Certainly, the continuation of appellants Permian is not threatened, as was true in **Johnson.** Also, if this Court is to permit such a severe threat to the station as was allowed in a case involving fraud, is there not all the more reason to affirm the New Mexico decree, which in no way threatens Permian's existence, when its licensed facilities are employed in disobedience of a statute designed to protect human eye sight? We submit that to ask the question is to answer it. True, this Court in effect stayed the operation of the Nebraska decree to enable the Commission to deal with new applications in connection with the station. But did that guarantee that there would be applications? Or that the Commission would approve one? Certainly not. Throughout his brief, the Solicitor General complains that the ~~instant~~ decree in effect would interfere with the Commission's duty to properly consider the scope and quality of service; or the composition of programs (matters which are for administrative determination in granting or rendering licenses); that it would interfere with a broadcaster's duty to meet local programming needs; that it would be potentially disruptive of uniformity; and that it would interfere with the public interest. **But all of this could have been said of the Nebraska decree in Johnson.** The loss of the station easily could have affected the scope of service; local needs might not have been met; uniformity could easily have been disrupted since not all states have the same elements of fraud; and certainly the public interest was threatened, since the result might be no one operating station **WOW.**

The Solicitor General would dismiss a case such as **Johnson** by saying that it involved enforcement of a tradi-

tional or common law right, which is permissible, whereas here we have a case of social or welfare legislation, the impact of which should not fall upon broadcasters or their facilities. We submit that is no distinction. It is not the cause (such as a traditional crime or tort) of the state action which is controlling, but rather is the impact upon the broadcaster, and the degree of interference therewith. As seen, the degree of interference by the state action in *Johnson* was far more severe than here.

Regents v. Carroll, 338 U. S. 586 (1950), further substantiates our position. There, as here, the Federal Communications Commission filed a brief *amicus curiae*. The petitioner (Board of Regents) had entered into a stock purchase contract, which according to Commission findings would have seriously jeopardized its financial ability to conduct its station in the public interest. The Commission refused renewal of the license until petitioner repudiated the contract. The Georgia courts enforced it; thus presenting this Court with the task of deciding whether a state could enforce a contract where to do so would have the practical effect of nullifying the Commission's order. In fact, petitioner defended the action on this, and another ground. The Supremacy Clause of the Constitution, Art. 6, Cl. 2, was thus involved.

This Court affirmed, resting its decision on *Radio Station WOW, Inc. v. Johnson*, *supra*. The Commission had based its refusal to renew petitioner's license, absent repudiation of the contract, on the basis that renewal would not be in the public interest. There was nothing in the Federal Communications Act specifically empowering it to adjudicate the contractual liability of a licensee. Petitioner argued that the Commission was faced with a dilemma — either it had to condone violation of its rules pertaining to financial responsibility and renew the license anyway;

or, deprive the listening public of the advantages of a station under petitioner's management. While sympathizing with the Commission's position, this Court affirmed and refused to interfere with the state action. Finally, it was held irrelevant that the respondents had not intervened in the license renewal proceedings.

Here then was a real threat to the broadcaster and its duty to act in the public interest. (Compare the Solicitor General's argument that the public interest which the Commission must consider should exclude the action taken by New Mexico). It could have refused to repudiate the contract, thus entailing loss of its license. Or, it could have taken the course it did and suffer the consequences of breach of contract, i.e., a judgment against it for \$145,000.00.

The Solicitor General, throughout his brief, stresses the adverse impact upon the public interest if New Mexico can enjoin the price advertising. We submit the impact of the state action in this case is far less of a threat to the public interest in continued broadcasting than was inherent in the **Carroll** case. The case at bar involves no threat to appellant Permian's continued operations. Nor does it present the possibility of nullifying an order of the Commission. One minor phase of its advertising, and that alone, is involved. In addition, the Solicitor General argues that appellee could have presented its views to the Commission the last time Permian's license renewal was pending, and could have urged a refusal to renew because of violation of state law, See Brief p. 36. We submit this argument is disposed of by this Court's refusal to place any significance on the failure of respondents in **Carroll** to intervene before the Commission, when the license renewal proceedings were pending.

In **Kroeger v. Stahl**, 248 F.2d. 121 (C.A. 3, 1957), the plaintiff operated a radio station licensed by the F. C. C. He desired to transfer his station to a new location and received temporary authorization from the F.C.C. to do so. The new location was in an area zoned by local ordinance, as residential only. Plaintiff sought injunctive relief against the local officials from interfering with the construction and operation of his radio facilities. He contended the ordinance conflicted with the Radio Communications Act; that it was an improper exercise of police power; that it imposed unwarranted burdens on interstate commerce; and that it was confiscatory and arbitrary. After stating that zoning ordinances are proper police power measures to protect the public health, safety and welfare, the Court at page 123 said:

"As to whether or not the ordinance is inconsistent with powers delegated by Congress to the Federal Communications Commission or is an unwarranted interference with interstate commerce, the following quotations set forth in the opinion of the District Court are appropriate:

"In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution." **Sherlock v. Alling**, 1876, 93 U. S. 99, 103, 23 L. Ed. 819; and

"The principle is thoroughly established that the exercise by the state of its police power, which would

be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'" *Kelly v. State of Washington*, 1937, 302 U. S. 1, 10, 58 S. Ct. 87, 92, 32 L. Ed. 3.

"The mere fact that plaintiff is engaged in interstate commerce and proposes to use the property involved for that purpose does not affect the validity of the ordinance. The restrictions as to use are not directed toward the regulation of commerce; and the effects on commerce are no less incidental than those of restrictions as to use for stockyard purposes in residential districts. As such they are not so repugnant to the right or power to regulate interstate commerce as to constitute an unwarranted invasion. By the same reasoning the ordinance is reconcilable with the provisions of the Federal Communications Act of 1934, as amended, pertaining to the regulation of radio broadcasting. 47 U. S. C. A. Sec. 151 et seq."

We pose this question to appellants: If a zoning ordinance may constitutionally be applied so as to stop the construction of a radio station duly licensed, why then may not a measure enacted in the protection of human eyesight be used constitutionally to prevent a radio station from disseminating advertising contrary to that measure? Unless the use of real estate is more sacred than the protection of the eye, we submit the question is unanswerable. Indeed, the impact of the local action in the *Kroeger* case, upon the federal license, was much more severe than in the case at bar. Interesting too is the fact that the case involved a zoning ordinance, which is a social or welfare measure, and not a traditional common law concept.

In the **Huron Portland** case, *supra*, this Court addressed itself to the problem presented by the fact that the ship-owner possessed a federal license, and said:

"The mere possession of a federal license, however, does not immunize a ship from the operation of the normal incidents of local police power, not constituting a direct regulation of commerce. Thus, a federally licensed vessel is not, as such, exempt from local pilotage laws, *Cooley v. Board of Wardens of Port of Philadelphia*, 12 How. 299, 13 L. Ed. 996, or local quarantine laws, *Morgan's Louisiana & T. R. & S. S. Co. v. Louisiana Board of Health*, 118 U. S. 455, St. Ct. 1114, 30 L. Ed. 237, or local safety inspections, *Kelly v. State of Washington*, 302 U. S. 1, 58 S. Ct. 87 82, L. Ed. 3, or the local regulation of wharves and docks, *Packet Co. v. Catlettsburg*, 105 U. S. 559, 26 L. Ed. 1169. Indeed this Court has gone so far as to hold that a state, in the exercise of its police power, may actually seize and pronounce the forfeiture of a vessel 'licensed for the coasting trade, under the laws of the United States, while engaged in that trade.' *Smith v. Maryland*, 18 How. 71, 74, 15 L. Ed. 269. The present case obviously does not even approach such an extreme, for the Detroit ordinance requires no more than compliance with an orderly and reasonable scheme of community regulation. The ordinance does not exclude a licensed vessel from the Port of Detroit, nor does it destroy the right of free passage. We cannot hold that the local regulation so burdens the federal license as to be constitutionally invalid."

Appellants cite various cases in which this or other courts have said that the Federal Communications Act occupies the field or creates a comprehensive system of

regulation of radio. We cannot deny that court opinions exist which employ such language. Nonetheless, these statements must be viewed in the light of the facts and situation present in the particular case. See for example **Scripps-Howard Radio, Inc., v. Federal Communications Commission**, 316 U. S. 4 (1942) (Brief of Appellants, p. 25) wherein a procedural question was involved, and no state statute was before this Court; **Federal Communications Commission v. Pottsville Broadcasting Co.**, 309 U. S. 134 (1940) (Brief of Appellants p. 25) wherein there was no issue of state-federal conflict; **Benanti v. U. S.**, 355 U. S. 96 (1957) (Brief of Appellants, p. 25) where the issue was whether evidence obtained by a wire tap by state officers in violation of the Federal Communications Act was admissible into evidence in a federal court; **National Broadcasting Co. v. U. S.**, 319 U. S. 190 (1943) (Brief of Appellants p. 25) where the issue was the Commission's authority to promulgate chain broadcasting regulations; and **Lamb v. Sutton**, 164 F. Supp. 928 (D. C. Tenn., 1958) (Brief of Appellants pp. 25-26) which was a libel action, and wherein the remark of the court quoted by appellants was in regard to the provisions against censorship of 47 U. S. C. A. Sec. 315. The Solicitor General employs some of these cases for the same purpose as appellants.

Appellant Permian says it is faced with a dilemma (Brief p. 31), citing **Farmers Union v. WDAY**, 360 U. S. 525 (1959). We see no dilemma. Obedience to the state law would remove the problem, and if obeyed, could not place Permian in any position of prejudice with the Commission, or work a violation of the Communications Act. The broadcaster was faced with no dilemma once **Farmers Union** was decided, as this Court held that he was given a federal immunity from liability for libelous statements broadcast by a political candidate. Compare the **Carroll**

and **Johnson** cases, *supra*, where the broadcasters were left with serious dilemmas.

The Solicitor General cites **Allen B. Dumont Laboratories v. Carroll**, 184 F. 2d. 153 (C. A. Pa., 1950). Appellants likewise cite the case, contending it is the decision most closely in point, i. e., that the state has no power to censor radio programs. Pennsylvania had enacted legislation providing for state censorship over broadcasting of motion pictures by television.

Dumont represents another decision in which it is said that Congress has occupied the field. But what were the facts and issues before the Court? First, the Pennsylvania statutes involved were not set out in either 86 F. Supp. 813 or 184 F. 2d. 153, although the regulation provoking the litigation was. From the latter, it was clear that Pennsylvania imposed a comprehensive censorship scheme on all films for television broadcasts. The regulation was squarely directed at broadcasts and had the censorship of broadcasting as its sole purpose. That the purpose of the state regulation and the purpose of the national regulation are material is firmly established by **Huron Portland** in determining the issue of pre-emption. The New Mexico provisions against price advertising are not directed against broadcasting as such, as was true in **Dumont**. They do not constitute a wholesale scheme of censorship. Their affect on the broadcaster is only incidental. The court of appeals mentioned provisions of the Communications Act which were involved. They were:

47 U. S. C. A. Sec. 308 (b) providing for the Commission to check the character of an applicant.

47 U. S. C. A. Sec. 307 (d) dealing with license renewals.

47 U. S. C. A. Secs. 309 (b) (2) and 310 (b) prohibit

ing license transfer or assignment without Commission approval.

47 U. S. C. A. Sec. 303 (m) (D) authorizing suspension of a license for transmitting profane or obscene words or meaning, or false or deceptive signals, and

18 U. S. C. A. Sec. 1464 providing for criminal sanctions for uttering indecent, profane or obscene language by radio.

Then the court said:

"It is clear from the foregoing that Congress was concerned with the contents of the programs of all broadcasting stations including television transmitting stations, and provided exemplary penalties, including loss of license and penal sanctions for the transgressor who should broadcast an indecent or obscene program. Congress did not intend to control in advance the broadcasting of radio programs but it did intend to prevent the transmittal of obscene matter through the ether. Program control was entrusted to the Federal Commission and it is an effective one." (Emphasis ours.)

Thus it is apparent that the **Dumont** case was concerned with either indecent, profane or obscene publications, or with false or deceptive signals. Both of these were covered by the the **Communications Act**. We submit **Dumont** is thus limited, and is nowise controlling here since no conflict obtains.

In the case at bar it is **truthful advertising** that is involved, and as correctly pointed out in the opinion below, the **Communications Act** doesn't attempt to regulate truthful advertising.

Program control as such is not given to the Commission. The Solicitor General and appellants, as we understand their argument, assert that a species of program control has been delegated to the Commission by virtue of its authority to consider the needs of the public in issuing or renewing licenses. In the latter proceedings, program content, including advertising, must be considered, it is true. However, that is a far cry from saying that the Commission is given power, as a separate and independent item, to regulate advertising content. Indeed, 47 U. S. C. A. Sec. 326 expressly negatives any such concept. And see *Federal Communications Commission v. Sanders Bros. Radio Station*, supra, wherein at 475 it was said:

"The Commission is given no supervisory control of the programs, of business management or of policy."

The point is that although the Commission may take certain things into consideration, it is not thereby given exclusive jurisdiction over such matters. See *U. S. v. Radio Corporation of America*, 358 U. S. 334 (1959). And so in the case at bar, while it may give consideration, in appropriate proceedings, to content of advertising, it does not follow that the Commission has jurisdiction over advertising to the extent that state action is precluded. Thus, the numerous authorities cited relative to Commission consideration of program content in application or renewal proceedings are not in point. Indeed, the Solicitor General concedes (Brief p. 10) the Commission's authority is centered around its licensing functions.

Appellants would seek to magnify the impact of New Mexico's action by asking this Court to assume (Br. pp. 30-31) that New Mexico prohibited all advertising by optometrists. This is not warranted by the law, as it is only price advertising with which this case is concerned.

The Solicitor General cites cases (Brief p. 5) to the effect that federal pre-emption of the field will occur by assumption or inference when the federal interest is dominant, or from the broad scope of authority conferred on the federal agency. This may have been the law at one time. But we submit it no longer is in view of **Huron Portland** holding that **actual conflict** between federal and state law is the criterion. Indeed, this Court in **Huron** compared its holding with that in **Napier v. Atlantic Coast Line R. Co.**, 272 U. S. 605, one of the cases relied upon by the Solicitor General, and in which this Court found pre-emption even though the state act was different in purpose. By contrast, the purpose of the federal and state acts was most material in **Huron**.

Then the Solicitor General (Brief p. 17) acknowledges that a broadcaster's duty to meet local needs may include the obligation to refrain from accepting advertising in violation of law. Of course, the broadcaster should do so, and the Commission ought to give weight to this in application or renewal proceedings. But that is only one factor for the Commission to consider. It may or may not be controlling; and the Commission is not amenable to state law. In the meantime, who is to make the station-law abiding? Only the state authorities, unless, of course, this Court is prepared to say the Federal Communications Act creates such a shield that a licensed broadcaster may flout state law at will. We submit neither the act or the commerce clause were so designed.

The Solicitor General insists (Brief p. 24, for example), that uniform national regulation of content of programs is as necessary as regulation of transmission. Yet he also takes the position that each broadcaster must give heed to local needs and be largely governed thereby, and must obey state law. We venture the remark that this appears

inconsistent. In effect, this is saying that the states can't touch program content, because it is national in scope and any laws touching it are unconstitutional; but nonetheless the broadcasters must obey those state laws because otherwise the disobedience may give rise to Commission refusal to renew a license.

Then, the Solicitor General expresses concern over the situation of advertising through network broadcasts. First, network advertising isn't involved in the instant case. Second, we submit the law of the state where the station is located, absent a conflict with federal statutes (which is not shown to exist) should govern, when, as here, it is enacted as a local health measure applicable to all. It is one thing to say that the state regulation here conflicts with federal authority (Brief p. 29), and quite another thing to show that "... direct and positive conflict ..." which is made the criterion of pre-emption. *Kelly v. State of Washington*, *supra*. Appellants and the Solicitor General fail in this regard.

Appellants and the Solicitor General, constantly stress the fact that the optometrist whose advertising is involved is a Texas resident. We fail to see the significance in this, for if he were a New Mexico resident, New Mexico's injunction against Permian would have no greater, nor less, impact on interstate commerce.

It is conceded by the Solicitor General (Brief p. 29) that the Communications Act doesn't broadly withdraw from the states the power to redress private wrongs. He says the fact that the Act contains no remedial provisions on behalf private persons is strong evidence no pre-emption was intended by Congress in the field of private actions. Appellee agrees wholeheartedly. But exactly the same is true of redress of public wrongs violating state

health measures. There, too, the Act contains no relevant provisions. There, too, it must be said that Congress intended no pre-emption. It will not do to say that redress of private wrongs by state courts presents little chance of conflict with federal policy. Consider, for example, the state judgment for \$145,000.00 against the broadcasters in *Regents v. Carroll*, supra, which this Court allowed to stand. When viewed with the grim spectre of an execution for \$145,000.00, to be levied on property used in broadcasting, we would say that some threat to continued broadcasting of anything was quite likely. Yet the state action was permissible — not because "private" wrongs were involved, but because this Court ruled against pre-emption.

Appellee submits that it is relevant to consider, in this matter of pre-emption, what Congress could have done, but didn't. It might have provided, with appropriate guides or standards, that the Commission should regulate with regard to the type of advertising to be allowed. Or Congress might have forbidden all interstate advertising relative to alleviation of human ills. Or Congress might have forbidden interstate advertising by those engaged in treating eyesight, or teeth, or any other bodily defect. Or Congress might have forbidden interstate advertising by lawyers. But it didn't! And so, the only inference is that Congress intended no pre-emption, leaving these matters to the states, absent something such as false signals or obscene utterances. Clearly, this field has not been pre-empted.

POINT III

The injunction does not constitute state action prohibited by the Fourteenth Amendment.

One would think this whole problem had been set at rest by *Williamson v. Lee Optical of Oklahoma, Inc.*, 348

U. S. 483 (1955), wherein there was no dissenting opinion, although Mr. Justice Harlan took no part in the consideration or decision in the case. This Court, speaking through Mr. Justice Douglas, pp. 489-490, said:

"Third, the District Court held unconstitutional, as violative of the Due Process Clause of the Fourteenth Amendment, that portion of Sec. 3 which makes it unlawful 'to solicit the sale of . . . frames, mountings . . . or any other optical appliances.' The Court conceded that state regulation of advertising relating to eye examinations was a matter 'rationally related to the public health and welfare', 120 F. Supp. at 140, and therefore subject to regulation within the principles of *Semler v. Oregon State Board of Dental Examiners*, *supra*. But regulation of the advertising of eyeglass frames was said to intrude 'into a mercantile field only casually related to the visual care of the public' and restrict 'an activity which in no way can detrimentally affect the people.' 120 F. Supp. at 140-141.

"An eyeglass frame, considered in isolation, is only a piece of merchandise. But an eyeglass frame is not used in isolation, as Judge Murrah said in dissent below; it is used with lenses; and lenses, pertaining as they do to the human eye, enter the field of health. Therefore, the legislature might conclude that to regulate one effectively it would have to regulate the other. Or it might conclude that both the sellers of frames and the sellers of lenses were in a business where advertising should be limited or even abolished in the public interest. *Semler v. Oregon State Board of Dental Examiners*, *supra*. The advertiser of frames may be using his ads to bring in customers who will buy lenses. If the advertising of lenses is to be

abolished or controlled, the advertising of frames must come under the same restraints; or so the legislature might think. We see no constitutional reason why a State may not treat all who deal with the human eye as members of a profession who should use no merchandising methods for obtaining customers."

While the narrow issue was a deprivation of due process of law, what the Court said in the last sentence above quoted is clearly dispositive of appellants' contentions relative to freedom of speech and of depriving appellant Head of privileges and immunities. And this Court's reasoning is the complete answer to the belaboring by appellants of whether or not advertising of glasses is commercial or not (Brief pp. 36-38).

Thus the power of the state to forbid price advertising by optometrists has been conclusively established. If legislation of this sort works no constitutional violation as to the optometrist, then ipso facto it is valid as to those with whom the optometrist would advertise.

At this juncture, appellee must object strenuously to the injection by appellants of a new issue into this case, i. e., freedom of speech and press. Rule 40 (d) (2) of this Court forbids the raising of an additional issue not raised in the jurisdictional statement. The Jurisdictional Statement, under "Questions Presented" at p. 3, is as follows:

"(1) unconstitutional as an undue and unreasonable burden on interstate commerce under the Commerce Clause of the United States Constitution, Article I, Section 8, clause 3.

(2) unconstitutional under Section 1 of the Four

teenth Amendment to the United States Constitution, either as an abridgment of their privileges and immunities as citizens of the United States, or as a deprivation of their property without due process of law, or as a denial to them of equal protection of the laws."

It contains no reference to a challenge under freedom of publication. Rule 15, subdivision 1 (c) (1) of this Court provides that only those issues raised in the jurisdictional statement will be considered. Appellants' Notice of Appeal (R. 54) gave notice that the following issues were to be presented (R. 56):

"(1) unconstitutional as an undue and unreasonable burden on interstate commerce under the Commerce Clause of the United States Constitution, Article I, Section 8, clause 3.

(2) unconstitutional under Section 1 of the Fourteenth Amendment to the United States Constitution, either as an abridgment of their privileges (sic) and immunities as citizens of the United States, or as a deprivation of their property without due process of law, or as a denial to them of equal protection of the laws."

Rule 10, subdivision 2 of this Court limits consideration to those questions set forth in the notice of appeal. Nor was this an issue raised in the state courts. (R. 4-5, 8, and 14).

Appellants (Brief p. 34, footnote 18) anticipate our objection, but they say that freedom of press is as truly a right of property as it is of liberty. But appellants are in a trap in saying this. If freedom of the press and right of property (due process) are one and the same questions

then the **Williamson** case, *supra*, dispels the argument of appellants about freedom of expression. On the other hand, if these are different questions, appellants have seriously violated the rules of this Court. At any rate, publishers by newspaper or radio are not singled out, the law merely applies to them what it applies to others, and consequently, there is no unconstitutional restraint on expression. **Lorain Journal v. U. S.**, 342 U. S. 143 (1951).

Semler v. Oregon State Board of Dental Examiners, 294 U. S. 608 (1935), while not relating to optometry, involved an Oregon statute forbidding certain advertising by dentists, including price advertising. The plaintiff asserted the act violated the due process and equal protection clauses of the **Fourteenth Amendment**, and impaired the obligation of contracts contrary to **Sec. 10, Cl. 1, Art. 1** of the Constitution. This Court held the statute to be a valid exercise of the police power, to which the plaintiff's contracts were subject, and further, that there was no unconstitutional discrimination, or arbitrary interference with either liberty or property. This Court, pp. 612-613 said:

"And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the 'ethics' of the profession is but the consensus of expert opinion as to the necessity of such standards.

"It is no answer to say, as regards appellant's claim of right to advertise his professional superiority or his performance of professional services in a superior manner, that he is telling the truth. In

framing its policy the legislature was not bound to provide for determinations of the relative proficiency of particular practitioners."

That this reasoning is equally applicable to advertising related to optometry is established by this Court's use of *Semler* in the *Williamson* case.

As was said in *Bedno v. Fast*, *supra*:

"To permit price advertising on the part of those who deal with the human eye, even truthful advertising, is to leave the door open for the unscrupulous practitioner to lure and to defraud unsuspecting members of the public."

In *Ritholz v. Commonwealth*, 184 Va. 339, 35 SE 2d, 210 (1945), suit was instituted by Virginia State Board of Examiners in Optometry, charging respondents with the illegal practice of optometry, particularly in regard to the resort to illegal advertising in newspapers. The Court held that the advertising of the sale of glasses and optometrical services at prices apt to be used as bait to the unwary, and that the reasonable statutory regulation of advertising involving professional services is proper where evil will occur in the absence of such legislation. The Court held that the legislation was proper under the police power, and that due process was not infringed upon.

See also, *City of Springfield v. Hurst*, 144 Ohio St. 49, 56 N. E. 2d 185 (1944); *Ritholz v. Johnson*, 246 Wis. 442, 17 NW 2d 590 (1945); *Abelsons v. New Jersey State Board of Optometrists*, 5 N. J. 412, 75 A. 2d 867 (1950); *Seifert v. Buhl Optical Co.*, 276 Mich 692, 268 N. W. 784 (1936); *Bennett v. Indiana State Board of Reg. and Ex. in Optometry*, 211 Ind. 678, 7 N. E. 2d 977 (1937); *Klein v. Department of Reg. and Ed.*, 412 Ill. 75,

105 N. E. 2d 758 (1952); and *State v. Rones*, 223 La. 839, 67 So. 2d 99 (1953), holding that statutes like those at bar constitute no violation of due process or of equal protection.

New Mexico's statute is clearly a legitimate police power measure. Its operation, of course, is limited to advertising promulgated in New Mexico. It could not and cannot operate upon advertising promulgated elsewhere. The suggestion by appellants (Brief p. 39, footnote 21) that because New Mexico hasn't proceeded against news media in other states, they are thereby subjected to discrimination, needs no discussion.

POINT IV

The injunction, as to Appellant Head, does not deprive her of her privileges and immunities as a citizen of the United States.

In *Madden v. Commonwealth*, 309 U. S. 83 (1940) the issue was whether a state statute, which imposed on its citizens an annual tax on their bank deposits in banks out of the state at a higher rate than on their bank deposits in the state, was an infringement upon privileges and immunities. This Court said:

"The appellant presses urgently upon us the argument that the privileges and immunities clause of the Fourteenth Amendment of the Constitution of the United States forbids the enforcement by the Commonwealth of Kentucky of this enactment which imposes upon the testator taxes five times as great on money deposited in banks outside the State as it does on money of others deposited in banks within the State. The privilege or immunity which appellant contends is abridged is the right to carry on business

beyond the lines of the State of his residence, a right claimed as appertaining to national citizenship.

"There is no occasion to attempt again an exposition of the views of this Court as to the proper limitations of the privileges and immunities clause. There is a very recent discussion in *Hague v. Committee Industrial Organization*. The appellant purports to accept as sound the position stated as the view of all the justices concurring in the *Hague* decision. This position is that the privileges and immunities clause protects all citizens against abridgment by states of rights of national citizenship as distinct from the fundamental or natural rights inherent in state citizenship. This Court declared in the *Slaughter-House Cases* that the Fourteenth Amendment as well as the Thirteenth and Fifteenth were adopted to protect the negroes in their freedom. This almost contemporaneous interpretation extended the benefits of the privileges and immunities clause to other rights which are inherent in national citizenship but denied it to those which spring from state citizenship. In applying this constitutional principle this Court has determined that the right to operate an independent slaughter-house, to sell wine on terms of equality with grape growers and to operate businesses free of state regulation were not privileges and immunities protected by the privileges and immunities clause. The Court has consistently refused to list completely the rights which are covered by the clause, though it has pointed out the type of rights protected. We think it quite clear that the right to carry out an incident to a trade, business or calling such as the deposit of money in banks is not a privilege of national citizenship." (Emphasis ours).

It is apparent that appellant Head has suffered no deprivation of privileges and immunities, and **Madden** is conclusive on this point. She cites three cases under this point. **Crutcher v. Kentucky**, 141 U. S. 47 (1891) involved a license which was required before any business could be done, which was viewed as a condition precedent to engaging in interstate commerce. **Lovell v. City of Griffin**, 303 U. S. 444 (1938), involved an ordinance prohibiting distribution of circulars, handbooks, advertising or literature of any kind, and wasn't decided on the basis of privileges and immunities. **Edwards v. California**, *supra*, was decided under the commerce clause, although four members of this Court expressed the opinion that the California act, forbidding entrance into that state of certain persons, ran afoul of the privileges and immunities clause.

In any event the short answer is that no citizen of the United States is before the Court complaining that his or her right to move freely from state to state has been curtailed. And even if so, as Mr. Justice Jackson pointed out in **Edwards**, the right of free movement is not an unlimited one, but is subject to some control by state government.

CONCLUSION

For the foregoing reasons, judgment should be affirmed.

Respectfully submitted,

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March, 1963.

Office Supreme Court U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 392

**AGNES K. HEAD, d/b/a LEA COUNTY PUBLISHING
CO., AND PERMIAN BASIN RADIO CORPORATION,**

Appellants,

against

**NEW MEXICO BOARD OF EXAMINERS
IN OPTOMETRY,**

Appellee.

**ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW MEXICO**

REPLY BRIEF FOR APPELLANTS.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1962

No. 392

AGNES K. HEAD, d/b/a LEA COUNTY PUBLISHING Co., and
PERMIAN BASIN RADIO CORPORATION,

Appellants,

against

NEW MEXICO BOARD OF EXAMINERS IN OPTOMETRY,

Appellee.

REPLY BRIEF FOR APPELLANTS

ARGUMENT

I.

The State of New Mexico's injunction is an undue and unreasonable burden on interstate commerce.

A. The cases relied on by appellee are distinguishable from this case.

In support of the injunction issued by the State of New Mexico prohibiting appellants from publishing and broadcasting price advertising of an optometrist residing and practicing in Texas, appellee in its brief (pp. 2-13) places its primary reliance on the following cases: *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); *Panhandle Co. v. Michigan Comm'n.*, 341 U.S. 329 (1951); *Buck v. California*, 343 U.S. 99 (1952); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949); *Bedna v. Fast*, 6 Wis. 2d 471, 95 N.W. 2d 396 (1959), cert. den. 360 U.S. 931 (1959); and *Ritholz v. Indiana State Board of*

Registration, etc., 45 F. Supp. 423 (N.D., Ind., 1937). All of these cases are plainly distinguishable from our case.

In the *Panhandle Eastern* case the Court limited its ruling to the question of federal preemption of interstate sales of natural gas under the Natural Gas Act. It found that the Act applied only to sales for resale to the ultimate consumer, and held that in passing the Act Congress intentionally left direct sales for consumption to state regulation (341 U.S. 329, 334). Relying on its earlier case of *Panhandle Pipe Line Co. v. Michigan Comm'n.*, 332 U.S. 507, 516-518 (1947), the Court did not need to determine the effect of the Commerce Clause on the challenged regulation independently of the action taken by Congress in the Natural Gas Act. But no act of Congress specifically sanctions the challenged activity of New Mexico, and the effect of the Commerce Clause on that activity is one of the questions now before the Court.

In the *Railway Express* case, on the other hand, the Court did consider the impact of the Commerce Clause on New York City's proscription of advertising on vehicles using the City's streets, upholding the restriction as valid even though some of the trucks of Railway Express moved in interstate commerce between New York and New Jersey. There is, however, a fundamental distinction between prohibiting trucks using a municipality's streets from carrying advertising, even though they may move in interstate commerce, and prohibiting a newspaper and radio station from publishing and broadcasting price advertising of a Texas optometrist in interstate commerce from a business site located in the State of New Mexico. In the *Railway Express* case the regulation was of local traffic, with an incidental effect on that portion of the traffic that moved between New York and New Jersey, and such regulation was of an advertising media clearly more akin to billboards than to newspapers or radio stations. As to billboards, this Court has held that they may be regulated to the point of prohibition, *Packer Corp. v. Utah*, 285 U.S. 105, 109-110 (1932); *Cusack Co. v. City of Chicago*, 242

U.S. 526 (1917). This Court has never so held with respect to newspapers¹ or radio stations.

The prohibition applied to appellants here is of a totally different character. The price advertising they have been enjoined from disseminating is of a purely interstate nature and was directed not only to New Mexico residents, who might thereby be induced to travel to Texas to avail themselves of Roberts' services, but also to others residing in Texas who might similarly be induced to avail themselves of Roberts' services.

The basis of the Court's holdings was that in highway cases, where no conflicting federal regulation is involved, local authorities are traditionally given great leeway, and on this point the Court relied on *South Carolina State Highway Department v. Barnwell Brothers, Inc.*, 303 U.S. 177, 187 (1938) which upheld South Carolina's regulations limiting the size and weight of trucks that could travel on its highways even though this clearly affected interstate commerce.

This Court has never sanctioned similar leeway in a case similar to that of appellants. On the contrary, even in the *Barnwell Brothers* case itself the Court drew important distinctions between the regulation of use of the highways and situations comparable to that of appellants, stating as follows:

"State regulations affecting interstate commerce, whose purpose or effect is to gain for those within the

¹ Indeed, in the *Packer Corp.* case the Court implicitly recognized that different rules applied as between billboard advertising and advertising by newspapers moving in interstate commerce. Utah had had a general statutory prohibition on tobacco advertising, but this had been held by the Utah Supreme Court to be void under the Commerce Clause as applied to an advertisement of cigarettes manufactured outside of Utah and inserted in a Utah newspaper circulating in other states. *State v. Salt Lake Tribune Publishing Co.*, 68 Utah 87; 249 Pac. 474 (1926). The law was then amended by deleting the proscription on advertising in newspapers, and it was the law as amended that was before the Court in the *Packer Corp.* case. As to the amended law the Court stated:

"The classification alleged to be arbitrary was made in order to comply with the requirement of the Federal Constitution as interpreted and applied by the highest court of the State. Action by a State taken to observe one prohibition of the Constitution does not entail the violation of another." (285 U.S. 105, 109)

state an advantage at the expense of those without, or to burden those out of the state without any corresponding advantage to those within, have been thought to impinge upon the constitutional prohibition even though Congress has not acted." (citing cases). (emphasis added)

"Underlying the stated rule has been the thought, often expressed in judicial opinion, that when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state. (citing cases)" (303 U.S. 177, 184-185, n.2)

Here, the State of New Mexico has undertaken to prevent appellant Head, who publishes a newspaper circulating in interstate commerce,² and appellant Permian, which

²It should be noted that while the American Optometric Association, Inc. (the "AOA") in its brief as *amicus curiae*, seeks to minimize the extent of the interstate commerce involved in this case (Brief of AOA, pp. 40-41), the State does not. In addition to the fact that it was the State of New Mexico that initiated this litigation and enjoined appellants, it is clear that this *de minimus* argument is devoid of merit under the circumstances of this case. See *Mabee v. White Plains Pub. Co.*, 327 U.S. 178 (1946); *NLRB v. Fainblatt*, 306 U.S. 601 (1939). In the latter case the Court stated that "The power of Congress to regulate interstate commerce is plenary and extends to all commerce be it great or small." and that "The amount of the commerce regulated is of special significance only to the extent that Congress may be taken to have excluded commerce of small volume from the operation of its regulatory measure by express provision or fair implication." (306 U.S. 601 at 606). That those cases were concerned with specific regulations of commerce by Congress under the Fair Labor Standards Act and the National Labor Relations Act, respectively, does not make them any less applicable to our case, for the power of Congress over interstate commerce such as here involved is plenary, and one having a single transaction in interstate commerce is surely as entitled to protection from state interference as one having many such transactions. Were the rule otherwise, a state's power to restrain new transactions in interstate commerce would be unlimited, a situation hardly contemplated by the framers of the Commerce Clause and never yet sanctioned by this Court.

Aside from this, there is as much basis in the record for assuming that the interstate commerce involved in this case is extensive as there is for assuming that it is minimal, and if New Mexico is content with the record in this case, the AOA should surely be content also.

broadcasts in interstate commerce, from disseminating price advertising of an optometrist residing and practicing in Texas. New Mexico now admits that its citizens "may travel to Texas to purchase eyeglasses from Roberts" (Brief of Appellee, p. 11). Admitting this, it is clear that the effect, if not the purpose, of New Mexico's action is to gain for New Mexico optometrists the advantage of being free from the competition of a Texas optometrist and that this advantage is to be gained at the expense of Roberts, appellants and the flow of information, goods and persons in interstate commerce. Moreover, appellee's action precludes Texas residents from learning of Roberts' prices and thereby from patronizing Roberts. Roberts and those who use his services thus suffer a disadvantage of the character contemplated in the *Barnwell Brothers* case, as quoted above, and this disadvantage has no conceivable corresponding advantage to persons residing within the State of New Mexico. This is particularly so in light of New Mexico's further admission that "Roberts is free to originate any kind of advertising in Texas that he may choose, even though subsequently heard or read in New Mexico." (Brief of Appellee, p. 6). A scheme of regulation having such an effect, we submit, unduly burdens interstate commerce.

B. *Baldwin v. G. A. F. Seelig*, 294 U. S. 511, 524 (1935) is sound precedent for appellant's position that appellees injunction unduly burdens interstate commerce.

Of equal significance to the above-quoted language from the *Barnwell Brothers* case is the fact that among other cases cited by the Court, in support of the rule set forth in that language, was *Baldwin v. G. A. F. Seelig*, 294 U.S. 511, 524 (1935). That case, involving an attempt by New York, under the guise of a health statute, to regulate the price paid for milk in Vermont, was fully discussed and quoted at length in appellants' initial brief (pp. 10-11; 15-18), and nothing appellee has stated in its brief in any way detracts from its soundness as authority for appellants' position.

Appellee attempts to distinguish the *Baldwin* case on the ground that there New York was trying to project its

price scheme into Vermont, a form of economic barrier, while here "New Mexico has no concern whatsoever with advertising originating in Texas." (Brief of Appellee, p. 7). Amplifying on this, appellee's brief states, at page 6:

"Both appellants are New Mexico residents and are amenable to its laws. It is advertising promulgated³ in New Mexico which is the subject of the injunction. (R. 21). *Roberts is free to originate any kind of advertising in Texas that he may choose, even though subsequently heard or read in New Mexico.* If New Mexico, by any method, sought to control advertising promulgated in Texas, then *Baldwin* would be applicable, but such is not the case here." (emphasis added)

Appellee's distinction as to where the advertising in this case originates is ill founded. While the District Court found that the advertising originates in New Mexico (R. 19), Roberts resides and practices optometry in Texas, (R. 18-19). Quite clearly, any advertisement by him must initially originate with him and in Texas, and the District Court's finding obviously means only that appellants' dissemination of this advertising begins in New Mexico, where appellants have their places of business. Roberts' advertising itself originates in Texas just as much as the milk in the *Baldwin* case originated in Vermont, and New Mexico's efforts to control the content of Roberts' advertising are no less a projection of New Mexico's laws regulating optometry into Texas than were New York's efforts to control the price of milk in Vermont.⁴ In view of this, Appellee's action is clearly proscribed by the teachings of the *Baldwin* case.

³ Actually, appellants were enjoined "from accepting or publishing within the State of New Mexico advertising of any nature from Abner Roberts, which quotes prices or terms on eyeglasses." (R. 21).

⁴ As discussed in appellants' initial brief (pp. 18-19), *Western Union Tel. Co. v. Foster*, 247 U.S. 105, 114 (1918), involves a similar situation—stock quotations being sent by wire from New York to Massachusetts for decoding and relay by ticker to subscribers. Just as the transmissions there remained in interstate commerce and free from interference by Massachusetts, so here, too, the advertising of Roberts that originates in Texas remains in interstate commerce when it is communicated to appellants for dissemination by them in interstate commerce.

Nor are the other cases relied upon by appellee any more persuasive in support of its position. In the case of *Buck v. California*, 343 U.S. 99 (1952), the Court upheld as valid San Diego County's application to drivers picking up passengers in Mexico and driving them across the unincorporated areas of San Diego County, an ordinance requiring taxicab drivers to obtain a permit from the sheriff. In so ruling the Court relied on a line of cases similar to those relied on in the *Railway Express* case, *supra*, such cases holding that a state could impose on those using its highways in interstate commerce an annual license fee, moderate in amount, for the maintenance of its highways. See *Aero Transit Co. v. Georgia Comm'n.*, 295 U.S. 285 (1935); *Hicklin v. Coney*, 290 U.S. 169 (1933). As already noted, such cases, involving use of the highways, do not support appellee's position. There is a significant difference between regulation of the highways by imposition of a moderate, non-discriminatory license fee to pay for the use of the highways, and the prohibition by New Mexico of price advertising by a Texas optometrist. In addition, Congress had regulated with respect to interstate carriers, but it had deliberately left the regulation of taxicabs to the states as a local matter.

Similarly, the case of *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960), is of no different character than the foregoing cases relied on by appellee and affords equally little support for its position. There, against challenges based on asserted federal preemption and an alleged undue burden on interstate commerce, the Court upheld as valid the application of a City of Detroit smoke abatement ordinance to a vessel inspected, approved and licensed by the federal government and trading in interstate commerce. With regard to preemption, the Court concluded that the federal inspection laws were aimed at safety and did not preempt the field of prevention of air pollution, a problem peculiarly a matter of state and local concern (362 U.S. 440, 445-446). As for burdening interstate commerce, the Court found no discrimination against interstate commerce and concluded that "no impermissible burden on commerce has been shown". (448)

However, the regulation in the *Huron* case was of a vessel in Detroit harbor, whereas here New Mexico is projecting its price advertising law beyond New Mexico to Texas for the clear purpose and effect of regulating the advertising of an optometrist residing and practicing in Texas. This distinction negates any suggestion that the *Huron* case controls this case.⁵

Nor do the cases of *Bedno v. Fast*, 6 Wis. 2d 471, 95 N.W. 2d 396 (1959), cert. den. 360 U.S. 931 (1959), *Solomon v. City of Cleveland*, 20 Ohio App. 19, 159 N.E. 121 (1926), appeal dismissed 116 Ohio St. 739, 158 N.E. 8 (1927), or *Ritholz v. Indiana State Board of Registration, etc.*, 45 F. Supp. 423 (N.D. Ind., 1937) support appellee's position. While interstate commerce questions were presented in the *Bedno* and *Ritholz* cases, the factual situations and the questions considered were not at all analogous to appellants' case. No commerce question was involved in the *Solomon* case.

Thus, in the *Bedno* case, the plaintiffs, manufacturers and merchants of optical goods, had a factory in Chicago and branches in several cities, including Milwaukee, Wisconsin. Orders for optical goods taken in Milwaukee were sent to Chicago, where they were filled and returned to Milwaukee. Advertising contracts were made by the plaintiffs in Chicago and all newspaper advertisements were placed from Chicago. Wisconsin law prohibited the price advertising of eyeglasses. Having placed an advertisement in a local Wisconsin paper, the plaintiffs sued for a declaratory judgment declaring the law inapplicable to them or unconstitutional and enjoining its enforcement. This relief was denied in all respects.

Aside from the other factual differences, no advertising medium was involved in that case, and the only question

⁵ Had the appellant in *Huron* been convicted for advertising in Detroit the prices at which it would transport goods in interstate commerce, this Court would have had a case more closely analogous to that of appellants here. But no such case would be likely to arise out of the City of Detroit, for even its efforts to restrict the price advertising of eyeglasses have been declared invalid by the Michigan courts as having no relation to public health. *Ritholz v. City of Detroit*, 308 Mich. 258, 13 N.W. 2d 283 (1944).

raised relating to interstate commerce was whether Congress had, by 15 U.S.C.A. §52, preempted the field of interstate advertising in the optical industry (95 N.W. 2d 396, 400-401).

As for the *Ritholz v. Indiana* case, while the Court stated as a conclusion of law that the sections of Indiana law challenged "are each constitutional and valid and . . . are not . . . in conflict with Clause 3 of Section 8 of Article I of the Constitution of the United States", the facts on which this conclusion was based are not analogous to those in our case. There, the plaintiffs did business in a fashion similar to the manner of doing business of the plaintiffs in the *Bedno* case,⁶ and no advertising media was a party to the case.⁷

Lastly, in the *Solomon* case, concerning the validity of a Cleveland, Ohio ordinance preventing the vending of papers and periodicals carrying horse racing news or tips on horse racing, while there was an assumption that gambling was illegal in every state, there was no showing that interstate commerce was involved or that an issue relating to it was raised. In view of this, the case is hardly persuasive support on the commerce question.⁸

⁶ Indeed, some of the plaintiffs in each case were apparently the same persons.

⁷ See *State ex rel Booth v. Beck Jewelry Enterprises*, 220 Ind. 276, 41 N.E. 2d 622 (1942) in which the Indiana Supreme Court narrowly construes the holding in the *Ritholz* case to such an extent that it could not possibly aid appellee here. Compare *Bennett v. Indiana State Board of Registration and Examination in Optometry*, 211 Ind. 678, 7 N.E. 2d 977 (1937).

⁸ In addition, the court in the *Solomon* case relied on *In re Rapier*, 143 U.S. 110 (1892) and in doing so completely misconstrued its holding and import. In the latter case the defendants were charged with mailing a newspaper containing an advertisement of a lottery in violation of a federal statute prohibiting mailing such matter. Adhering to its earlier decision in *Ex parte Jackson*, 96 U.S. 727 (1877), the Court upheld the government's right to refuse to become an agent, through use of the mails, to the circulation of printed matter it deemed harmful. But in the *Jackson* case, while the Court had held that Congress could deny use of the mails to various materials, including newspapers and pamphlets, the Court held that Congress could not "prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails." (96 U.S. 727, 735) In this context, the *Rapier* case was hardly authority for *Solomon* and the latter is hardly authority for appellee here.

C. New Mexico's enjoining of appellants cannot be justified as a health measure; the danger of retaliatory measures by other states is real.

Aside from the foregoing cases, appellee has two basic arguments under the Commerce Clause, namely, (1) that the statute in issue in this case is an exercise by New Mexico of its police power for the purpose of promoting and protecting the public health of citizens of New Mexico and as such is entitled to special consideration in determining whether it burdens interstate commerce, and (2) that there is little likelihood that the action challenged by appellants will lead to retaliatory measures by other states.

On the latter point it is sufficient to note that future retaliation need not necessarily be by statutes limiting price advertising of eyeglasses. Moreover, it is not necessary that parties such as appellants be victims of all possible retaliation for the threat of retaliation to be sufficient to preclude a state's burdening interstate commerce. In *Edwards v. California*, 314 U.S. 160 (1941), Edwards, a California resident, might not have been affected directly by any restrictions that Texas might have placed on travel in retaliation for those imposed by California, but that fact did not prevent this Court from considering the genuinely potential danger raised by California's action or from striking down the California restrictions partly on the basis of that danger (314 U.S. 160, 176).

On the former point, that this is a health statute, it is clear that merely characterizing an action as taken pursuant to the police power for protection of public health does not give the action any magical immunity from the proscriptions of the Constitution. "The States cannot use their most characteristic powers to reach unconstitutional results." *Burnes Natl. Bank v. Duncan*, 265 U.S. 17, 24 (1924). See also *Frost Trucking Co. v. R. R. Com.*, 271 U.S. 583, 598-599 (1926); *Western Union Tel. Co. v. Foster*, 247 U.S. 105, 114 (1918).

While the Court has, in some cases such as *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960), upheld local enactments aimed at health protection even

though the enforcement of such enactments had some impact on interstate commerce, it has not done so in all cases, despite the usual insistence by the state concerned that the regulation in question was surely directed towards health. We submit that the case of *Baldwin v. G.A.F. Seelig*, 294 U.S. 511 (1935), which appellants quoted and discussed at length on this point in their initial brief (pp. 15-18), puts this argument of appellee in proper perspective. Moreover, as Appellee has conceded that New Mexico citizens may travel to Texas and buy eyeglasses from Roberts (Brief of Appellee, p. 11) and that advertising of Roberts' prices may come into New Mexico from outside and be read and heard by New Mexico citizens (Brief of Appellee, p. 6), it is clear that the statute in question, as applied to appellants, has little if any relation to the public health. It is equally clear that it has no more relation to the public health than did the statute in the *Baldwin* case, and it should be accorded the same treatment.⁹

Aside from all the foregoing, we submit that appellee has wholly failed to make any meaningful distinctions in the cases cited and relied on by appellants in their initial brief, and we again urge that those cases are in point and compelling.

⁹ "That it is easy for a state or municipality to find a health basis for practically any restriction it wants to impose, is revealed by the following cases: *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (state law forbidding the teaching of foreign language in school held invalid despite "the suggestion that the purpose was to protect the child's health by limiting his mental activities"); *Needham v. Peapack*, 220 Ind. 265, 41 N.E. 2d 606 (1942) (state law prohibiting licensed funeral directors and embalmers from price advertising held unconstitutional); *People v. Osborne*, 17 Cal. App. 2d Supp. 771, 59 P. 2d 1083 (1936) (city ordinance prohibiting certain advertising of barbers' prices held unconstitutional); *Jones v. Bontempo*, 137 Ohio St. 634, 32 N.E. 2d 17 (1941) (state law forbidding price advertising by barbers held unconstitutional). See also *New State Ice Co. v. Liebman*, 285 U.S. 262, 278 (1932).

D. The American Optometric Association cannot set the standards of Texas optometrists, and its characterizations of the advertising in question are unjustified.

The AOA also devotes a portion of its brief as *amicus curiae* to the question of whether New Mexico's action unduly burdens interstate commerce. While most of the cases it cites, which include many of those relied on by New Mexico, do not require any detailed analyses or comment, one case must be placed in its proper perspective. The AOA consistently seeks to make too much of this Court's decision in *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). Thus, the AOA claims that that case "supports a determination here of no violation of the Commerce Clause" because the claimants raised the issue of advertising by newspapers and radio and on this basis claimed violation of the Commerce Clause (Brief of AOA, pp. 44-45). Whether the issue was raised or not, it was not mentioned in either this Court's opinion or that of the lower court,¹⁰ and it is clear that all this Court decided there was that the challenged regulation did not contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment (348 U.S. 483, 488-490).

Moreover, as appellants pointed out in their initial brief (pp. 11-12) the Oklahoma statute in question restricted only advertising by optometrists and specifically exempted from its provision any newspaper or other advertising media (348 U.S. 483, 488, n. 2; 120 F. Supp. 128, 131-132, n. 4), and no advertising media were involved in the case. When, in addition, it is considered that all of the parties in the case were dispensing opticians and ophthalmologists carrying on business and practicing in Oklahoma, it is apparent that the case is no support whatsoever for the position of New Mexico.¹¹

¹⁰ *Lee Optical Co. v. Williamson*, 120 F. Supp. 128 (W.D. Okla., 1954).

¹¹ Appellee similarly claims too much for the *Williamson* case, but it at least does so in connection with its argument that the challenged action of New Mexico does not deprive appellants of Due Process under the Fourteenth Amendment (Brief of Appellee, pp. 29-31, 33-34). Its argument is equally unsound.

Further, throughout its brief the AOA persists in characterizing Roberts' advertising and price advertising in general as "the practice of the charlatan and the quack" (pp. 12, 24, 42, 47) or "non-professional" (p. 42), or even fraudulent (pp. 35-36). Of course, it is understandable that a trade association such as AOA, one of whose objectives is surely the economic betterment of its member optometrists, would resent competition. But it is not for the AOA to determine the standards of conduct of an optometrist residing and practicing in Texas. That function quite clearly belongs to Texas, and while Texas does regulate the practice of optometry, it does not prohibit truthful price advertising. R. 28; *Vernon's Texas Civil Statutes*, Art. 4565g; *Shannon v. Rogers*, 459 Texas 29, 314 S.W. 2d 810, 816 (1958). Until Texas does so, we submit that it is not for the AOA to say to what standard a Texas optometrist should conform in advertising.

Not only does the AOA persist in this wholly unjustified characterization of Roberts' advertising, it suggests that this Court itself has generally characterized price advertising as the practice of the charlatan and the quack in the case of *Semler v. Dental Examiners*, 294 U.S. 608 (1935). This Court did not do so, as a careful reading of the Court's opinion reveals. On pages 611-612 the Court referred to the state court's defining of the policy of the statute in question and quoted the state court's characterizations:

"The State court defined the policy of the statute. The court said that while, in itself, there was nothing harmful in merely advertising prices for dental work or in displaying glaring signs illustrating teeth and bridge work, it could not be doubted that practitioners who were not willing to abide by the ethics of their profession often resorted to such advertising methods to lure the credulous and ignorant members of the public to their offices for the purpose of fleecing them. The legislature was aiming at 'bait advertising,' 'Inducing patronage,' said the court, 'by representations of 'painless dentistry,' 'professional superiority,' 'free examinations,' and 'guaranteed' dental work."

was, as a general rule, 'the practice of the charlatan and the quack to entice the public.' " (294 U. S. 608, at 611-612)

As the foregoing reveals, not only was the language relating to the practice of the charlatan and the quack not that of this Court, it did not even relate to price advertising. In this context, the AOA's mischaracterizations are all the more unjustified.¹² We submit that no such characterizations can detract from the essential substance of New Mexico's action. It has unduly burdened interstate commerce by imposing its standards on a Texas optometrist and its imposition, affecting appellants as it does, should not stand.

II.

The admissions of appellee that Roberts can advertise in New Mexico by media situated outside but read or heard in New Mexico show that appellee is discriminating against appellants and this denies them equal protection of the laws.

As appellants noted in their initial brief (p. 39, n. 21), an exemption of out-of-state media disseminating price information in New Mexico from the application of New Mexico's law on price advertising by optometrists would result in an unwarranted discrimination against appellants. This discrimination, which New Mexico now admits, deprives appellants of equal protection of the laws as guar-

¹² The *Scmler* case, of course, is not analogous to that of appellants. It simply upheld as valid an Oregon statute providing that a dentist's license could be revoked for various advertising, including price advertising. No issue of interstate commerce and no advertising media were involved.

Aside from these differences, it is to be noted that some courts have noted that there is no real analogy to be made between optometry and dentistry, for optometry is not a learned profession such as medicine, of which dentistry is a branch. See *Rice v. Ezatt*, 144 Ohio St. 483, 59 N.E. 2d 927, 929, (1945); *Commonwealth v. Miller*, 337 Pa. 246, 11 A. 2d 141 (1940); *Matter of Dickson v. Flynn*, 246 App. Div. 341 (3rd Dept., 1936), aff'd 273 N.Y. 72 (1937).

anted to them by the Due Process Clause of the Fourteenth Amendment, and is only one more reason why the challenged injunction should not stand. See *Little v. Smith*, 124 Kan. 237, 257 Pac. 959 (1927). Compare *State v. Packer Corp.*, 77 Utah 500, 297 Pac. 1013 (1931), aff'd. 285 U.S. 105 (1932); *Morey v. Doud*, 354 U.S. 457 (1957).

III.

The Federal Communications Act preempts the area into which appellee has intruded in enjoining appellant Permian from broadcasting Roberts' advertising.

A. None of the cases relied on by appellee negate preemption.

On the question of preemption appellee relies mainly on *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); *Kelly v. State of Washington*, 302 U.S. 1 (1937); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945); *Regents of the University System of Georgia v. Carroll*, 338 U.S. 586 (1950); and *Kroeger v. Stahl*, 248 F. 2d 121 (3rd Cir., 1957). The *Huron* case, as has already been noted, involved only a partial preemption by federal regulations relating to the safety of vessels, and the same is true of the *Kelly* case. See *Cloverleaf Co. v. Patterson*, 315 U.S. 148, 155 (1942). While the Court in its opinion in the *Kelly* case did state that there must be a "direct and positive" repugnance or conflict before state action, otherwise valid, is superseded by federal action (302 U.S. 1, 10), the Court was speaking of the conflict between state action and limited federal action, and nothing in the Court's opinion suggests that it intended to abandon those other tests by which preemption is judged.¹³

Similarly, the *Johnson* and *Carroll* cases, which appellants discussed in their initial brief (pp. 31-32), involved situations in no way analogous to that of appellant Per-

¹³ As appellants pointed out in their initial brief (p. 21) there are several tests of supersession, of which a conflict between the state and federal regulations is only one. See *Pennsylvania v. Nelson*, 350 U.S. 497, 502-505 (1956).

mian. Those cases did not involve regulation in advance of a broadcaster's programming. Here, however, New Mexico has attempted to prohibit Permian from broadcasting certain advertising, thus controlling in advance the content of Permian's programs. The Court in the *Johnson* case upheld the right of the state to adjudicate the claim of fraud in the transfer of a station, and to direct a reconveyance of the lease of the station to the transferor. However, the Court required the State to withhold execution of that portion of its decree requiring transfer of the physical property of the station until steps were ordered to be taken to enable the FCC to deal with new applications for a license in connection with the station (326 U.S. 120, 132). This accommodation of the States' power with respect to fraud to the public interest which led to the granting of the license itself attests to the preemption of the Federal Communications Act.

In both the *Johnson* and *Carroll* cases, the state courts were merely enforcing private rights, which the Court in *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 474-475 (1940), had recognized were involved in the ownership of a radio station. But in this case, New Mexico is not attempting to vindicate private rights, but to enforce its own asserted public right directly in conflict with the higher public right implicit in the Federal Communications Act and the broadcasting license of appellant Permian. That New Mexico's public right relates to eyesight does not make the conflict any less real.

The *Kroeger* case involved an attempt by one holding a temporary authorization from the FCC to conduct certain radio tests at a location already zoned as residential. Considering the nature of the authorization, 148 F. Supp. 403, 406, and the fact that the area was already zoned for residential use, that case lends no support to appellee. Appellant Permian does not contend that it need not comply with valid state laws; it only contends that the prohibition on what it can broadcast falls within the area foreclosed to New Mexico regulation. On this point the *Kroeger* case is silent.

B. The existence of other state statutes regulating optometrists is no reason for not finding preemption.

As for the AOA, it too treats the problem of preemption at length (Brief of AOA, pp. 12-37), and in doing so duplicates much of the argument of New Mexico, relying on essentially the same cases.¹⁴ For the most part, therefore, the foregoing discussion will cover the position of the AOA. One particular point must be emphasized, however. In arguing that there is no dominant federal interest justifying the preemption claimed by appellant Permian,¹⁵ the AOA urges that "state regulation of optometric price advertising is in fact fairly uniform," stating that "like New Mexico, thirty-one other states have proscriptions on price advertising of eyeglasses and other optometric materials" (Brief of AOA, p. 22). In fact, many of these statutes are not similar, for they clearly apply only to the person licensed and not to advertising media. For example, just as in the Oklahoma statute involved in *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488, n. 2 (1955), the Oklahoma statute cited by the AOA has a specific proviso excluding advertising media. And the statutes of Delaware, Hawaii, Minnesota, Missouri, Nevada, Oregon, Pennsylvania, South Dakota and Utah all are aimed not at advertising media but at licensees.

Thus, this argument of the AOA is hardly one of substance. While the Court in the case of *Halter v. Nebraska*, 205 U.S. 34, 39 (1907) did, quite properly, take note of the fact that many states had statutes similar to that under attack, the existence of those statutes was hardly controlling. Moreover, the presence of a number of similar laws in other states did not prevent this Court's

¹⁴ The AOA does present some imposing lists of cases holding no preemption (Brief of AOA, pp. 16-17). But these are only briefly cited and there is a conspicuous failure to analyze their facts and relate them to those of this case. As to these cases, compare those cases collected in *Southern Pacific Co. v. Arizona*, 325 U.S. 761, at 780-781 (1945).

¹⁵ And by the United States, which has filed a brief stating the position of the Federal Communications Commission that the Federal Communications Act preempts the action taken by appellee.

holding invalid a state statute that forbade the showing of "sacrilegious" films. *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495, 521 (1952). Here too the existence of similar statutes is not controlling. On the contrary, as appellants pointed out in their initial brief (p. 20) the existence of the many restrictive advertising laws of the various states, relating not only to advertising by optometrists, but to advertising by many other persons or of many other articles, emphasizes the correctness of appellants' position not only as to preemption¹⁶ but as to the burden on interstate commerce as well.

C. The Court in this case need not define the full extent of the preemption of the Federal Communications Act nor the full extent of the FCC's powers thereunder.

Appellant Permian does claim that the Federal Communications Act is so comprehensive in scope that it must preempt New Mexico's challenged regulation of its broadcasts. But as appellant Permian conceded in its initial brief (pp. 31-33) and as the United States also conceded in its brief (pp. 6-7, 12, 30-31), there are some areas of regulation of broadcasters left to the States.¹⁷ Both appellant Permian (pp. 23-24) and the United States (pp. 12-13, 15) also concede that there are limitations on the power of the FCC.

The positions of appellant Permian and the United States are not identical and appellant Permian does not subscribe to the entire position of the United States. But that there are such differences is not important in this case, for as the United States suggests in its brief at page

¹⁶ On this point see also the Brief of the United States, pp. 25-27.

¹⁷ Appellant Permian obviously could not claim that its manager could not be arrested for the crime of murder merely because this would mean the station would have to shut down. Compare the emphasis placed by both appellee and the AOA on the fact that the state action in both the cases of *Radio Station WOW, Inc. v. Johnson*, 326 U. S. 120 (1945) and *Regents of the University System of Georgia v. Carroll*, 338 U. S. 586 (1950) had a serious impact on a broadcast licensee (Brief of Appellee, pp. 16-19, 29; Brief of AOA, p. 36).

24, if the Court should find that the Federal Communications Act preempts the action taken by New Mexico against appellant Permian, the Court need not at the same time define all of the limits or all of the facets of the FCC's power and authority under the Act.

Moreover, we believe that the Court could find that by virtue of Section 326 of the Federal Communications Act, providing that the FCC does not have the "power of censorship over radio communications or signals transmitted by any radio station" and that "no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication", the authority of the FCC over radio communications and particularly over program content (including advertising) is extremely limited. We believe that the Court could find that the FCC is thus precluded from promulgating definitive regulations stating in advance acceptable program content conforming to a standard conceived by the FCC as acceptable and in the public interest. See *Farmers Union v. WDAY*, 360 U.S. 525, 529-530 (1959).¹⁸ But we submit that it is not essential

¹⁸ Even in such event, which would be consistent with the intent of Congress and the requirements of the Free Speech and Free Press provisions of the First Amendment, the Court could still find that the Federal Communications Act foreclosed New Mexico's action. On this point we submit that the statement of the Court of Appeals in *Allan B. Dumont Laboratories v. Carroll*, 184 F. 2d 153, 156 (3rd Cir., 1950), cert. den. 340 U.S. 929 (1951), quoted at pages 23-24 of appellants' initial brief, to the effect that the proscriptions of Section 340 on the authority of the FCC, in an otherwise comprehensive statutory regulation, did not open up the field for state censorship is correct. Despite the suggestions of New Mexico and AOA, it is not essential that there be some censorship. In this regard, the appellee appears to suggest that a little censorship by it of the broadcasting of appellant Permian is all right, for at page 24 of its brief it states as follows:

"The New Mexico provisions against price advertising are not directed against broadcasting as such, as was true in *Dumont*. They do not constitute a wholesale scheme of censorship. Their effect on the broadcaster is only incidental." (emphasis appellee's)

But that New Mexico's action is not a "wholesale scheme of censorship" does not save it, for it is clearly a regulation of appellant Permian's broadcasting and this, we submit, is an area foreclosed to New Mexico.

to a finding of preemption in this case that the Court spell out these various limits or the limits of the specific areas left to state regulation.

IV.

Appellee's arguments fall far short of justifying the deprivation of appellants' property without due process of law.

A. Appellees' injunction deprives appellants of due process by denying to them freedom of the press and appellants should be allowed to present the issue to this Court.

Appellants in their initial brief asserted that the challenged action of New Mexico deprived them of their property without due process of law in violation of the Fourteenth Amendment in two respects, one based on freedom of the press and the other based on the fact that the action in question bore no reasonable relation to the end sought to be achieved. As to the former, appellee protests that appellants are now trying to raise a question not raised below (Brief of Appellee, pp. 31-32). In appellants' initial brief it was pointed out that there might be some question about this (p. 34, n. 18). We submit, however, that the question of freedom of the press was properly raised below and in appellants' Jurisdictional Statement, although never fully articulated, for Freedom of the Press as protected by the First Amendment is incorporated in the Due Process Clause of the Fourteenth Amendment. We submit that the raising of the issue of a denial of due process below fairly comprised the issue of freedom of the press and that we should be allowed to present the question to this Court.

While the New Mexico Supreme Court did not specifically mention freedom of the press, we submit that its opinion leaves no doubt but that it considered that the injunction was valid and did not deprive appellants of due process (R. 51) and that further articulation of constitutional objections would not have resulted in a different decision. Under these circumstances appellants urge that the Court consider this issue. See *Braniff Airways v. Ne-*

Braska Board, 347 U.S. 590, 597-599 (1954); *Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); *St. Louis I. Mt. & So. Ry. Co. v. Starbird*, 243 U.S. 592, 598 (1917).

No case cited by either appellee or the AOA in any way detracts from the soundness of both of appellants' due process arguments. With regard to freedom of the press, appellee cites only *Lorain Journal v. United States*, 342 U.S. 143 (1951), which was a federal antitrust case and not remotely in point. The AOA, on the other hand, does claim that commercial advertising is not protected by the due process clause,¹⁹ citing essentially the same cases cited by appellants in their initial brief (Brief of AOA, pp. 46-48; brief of appellants, pp. 33-38).

Appellants have always admitted that the advertising in question was purely commercial in nature. But it was advertising disseminated by media whose business it is to disseminate information other than commercial advertising. Even advertising, as we set forth in our initial brief, may be of a more or less commercial nature and it may convey information of interest to the general public even though it is commercial (pp. 37-38). The Court has recognized that the constitutional protection for a free press does not apply only to the exposition of ideas, *Winters v. New York*, 333 U.S. 507, 510 (1948), and that freedom of speech and the press does not bear "an inverse ratio to the timeliness and importance of the ideas seeking expression." *Bridges v. California*, 314 U.S. 252, 269 (1941).

While this Court has limited the constitutional protections afforded to commercial material disseminated in various ways, *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949) (advertising on trucks); *Cusack v. City of Chicago*, 242 U.S. 526 (1917) (advertising on billboards); *Valentine v. Christensen*, 316 U.S. 52 (1952) (distribution of commercial handbills), it has never yet limited the constitutional protections afforded to commercial mate-

¹⁹ The AOA also suggests that appellants cannot be right on "both the First Amendment and preemption questions" (Brief of AOA, p. 15, n. 4). We submit, as we have already discussed, that appellant Permian can be right on both questions.

rial disseminated as an integral part of a newspaper or radio broadcast.²⁰ We submit that just as in such cases as *Martin v. Struthers*, 319 U.S. 141 (1943), *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) and *Jamison v. Texas*, 318 U.S. 413 (1943), the broadcasts and newspapers of appellants are partly commercial²¹ and partly non-commercial and that their entire dissemination should be free from the restraints imposed by appellee.

B. Appellees injunction deprives appellants of due process in that enjoining appellants from disseminating advertising of a Texas optometrist bears no real or substantial relation to New Mexico's claimed objective of protecting the health of its citizens.

The action of New Mexico in enjoining appellants from disseminating the price advertising of Roberts, a Texas optometrist, deprives appellants of their property in yet another way. The standard to which a state regulation must conform is that the action undertaken must not be unreasonable, arbitrary or capricious and must have a real and substantial relation to the end sought to be achieved. *Nebbia v. New York*, 291 U.S. 502, 525 (1934); *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 162 (1939). See also *Bates v. Little Rock*, 361 U.S. 516, 524-527 (1960).

Assuming generally that the claimed object of appellee, namely the protection of the health of New Mexico citizens, is a proper object for the exercise of its police power, we nevertheless submit that the means chosen by appellee bear no reasonable relation to the object sought to be at-

²⁰ The argument of the AOA that the Federal Trade Commission has a "familiar" history of cease and desist orders against deceptive and misleading advertisements is not in point (Brief of AOA, p. 47). The AOA conspicuously fails to cite any case in which the FTC has issued such orders against advertising media such as appellants.

²¹ That a suppressed expression is part of a commercial endeavor conducted for private profit does not preclude its protection under the freedom of speech and press of the First Amendment as incorporated into the Fourteenth Amendment. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-502 (1952). Compare *Bracard v. Alexandria*, 341 U.S. 622, 641-643 (1951).

tained and are in fact unreasonable, arbitrary and capricious. New Mexico has admitted that it is not attempting to prevent its citizens from traveling to Texas to purchase eyeglasses from Roberts and that they are free to read or hear price advertisements of Roberts sent into New Mexico by media situated outside (Brief of appellee, pp. 6, 11). Its statute, then, is only aimed at preventing its citizens from learning of Roberts' prices.

This cannot be a permissible objective, for if citizens of New Mexico have a right to travel to Texas to purchase eyeglasses from Roberts, they have a right to learn that he is there. Any other conclusion could not be squared with *Edwards v. California*, 314 U.S. 160 (1941). Therefore, the means selected to achieve this objective must of necessity fall as they apply to appellants.

Further, even if it be assumed that this limited objective be permissible, we submit that enjoining appellants from disseminating Roberts' advertising is an unreasonable and arbitrary means of accomplishing the objective. This injunction not only forecloses such information to New Mexico citizens, but to Texas and other states' citizens as well, and it places on the appellants an unwarranted burden of ascertaining state laws. If appellant Head must know whether advertisers who may seek to place advertisements in her paper are lawfully entitled to do so under the particular state statutes regulating their professional, business or other conduct in every state in which she may have circulation, it is clear that she must forego acceptance of much out-of-state advertising or bear a disproportionate expense in informing herself of the laws of these states. The same is true as to appellant Permian, though to a more limited extent because it broadcasts only in two states.

We submit that thus burdening appellants deprives them of their property without due process. See *Edwards v. California*, *supra*, at page 176, where the Court emphasized the virtual impossibility for migrants and those transporting them to acquaint themselves with the peculiar

rules of admission of many states. And see also *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 162 (1939), where the Court emphasized that other more obvious means for preventing the littering of streets than absolutely prohibiting distribution of handbills were available. We submit that here too other more obvious means are available to appellee to accomplish such objectives in the regulation of optometry in New Mexico as are proper, and we urge that appellee be left to those.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of the State of New Mexico should be reversed and the injunction against appellants dissolved and the action dismissed on the merits.

Respectfully submitted,

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